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Supreme Court of the United States

October Term, 1940

No. 661

FORD MOTOR COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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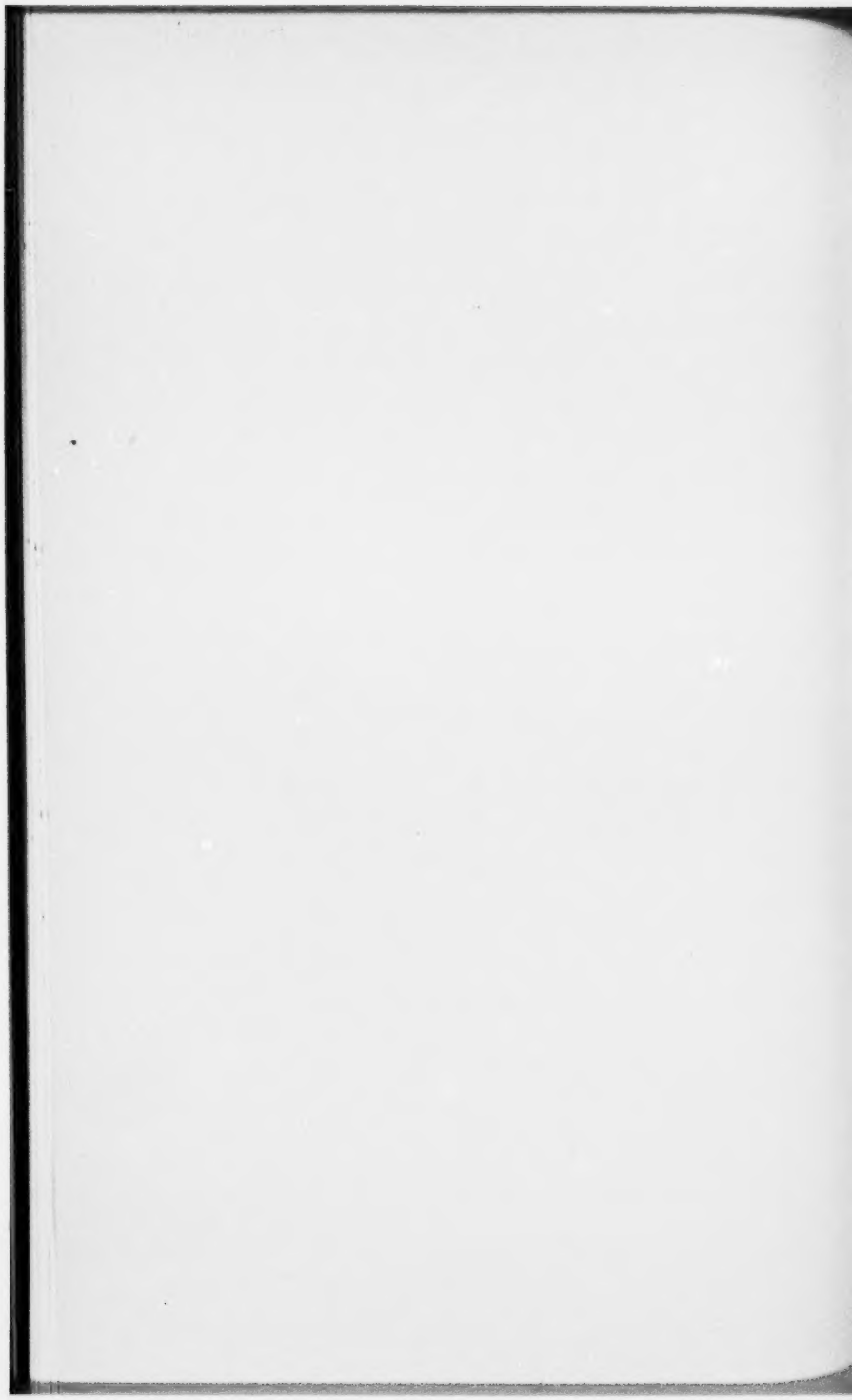

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Supreme Court of the United States

October Term, 1940

FORD MOTOR COMPANY,
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against
NATIONAL LABOR RELATIONS BOARD
No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ford Motor Company, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review paragraphs 1 and 5 of a decree entered October 8, 1940 (R. Vol. VI, p. 629), by said court denying certain motions and petitions (described below) and enforcing, as modified, an order of the National Labor Relations Board (hereinafter referred to as the Board), dated August 9, 1939, which directed petitioner to cease and desist from certain alleged unfair labor practices under the National Labor Relations Act (49 Stat. 449) (hereinafter referred to as the Act) and to take certain affirmative action.

OPINIONS BELOW

The decision and order of the Board (R. Vol. V, p. 283) was issued on August 9, 1939, and appears in 14

N. L. R. B. 346. The opinion of the Circuit Court of Appeals (R. Vol. VI, p. 611) was handed down on October 8, 1940, and is reported at 114 F. (2d) 905.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. §347(a), and Section 10(e) of the Act. The decree of the Circuit Court of Appeals for the Sixth Circuit to be reviewed was entered on October 8, 1940 (R. Vol. VI, p. 629).[1] A petition for rehearing was denied on December 2, 1940 (R. Vol. VI, p. 648).

STATEMENT

This proceeding is before the Court for the second time. In *Ford Motor Company* v. *N. L. R. B.*, 305 U. S. 364, this Court affirmed an order of the court below remanding the proceeding to the Board, upon motion of the Board, in order that the Board might set aside an order issued by it against petitioner on December 23, 1937, issue proposed findings and make its decision and order upon a reconsideration of the entire case.

After the remand, the Board set aside its first decision (R. Vol. V, p. 5), issued a proposed decision (*id.*, p. 7), permitted petitioner to file exceptions and a brief and to argue orally (*id.*, pp. 86, 273, 275), denied various motions

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[1]On December 5, 1940, the court below modified its decree to accord with this Court's decision in *Republic Steel Corp.* v. *N. L. R. B.*, decided November 12, 1940, with respect to work-relief funds (R. Vol. VI, p. 648).

of petitioner (*id.*, pp. 84, 269, 282), and on August 9, 1939, issued a second decision and order against petitioner, in which it concluded that petitioner had engaged in unfair labor practices within the meaning of Sections 8(1) and 8(3) of the Act (*id.*, p. 283).

The Board found that petitioner had engaged in unfair labor practices with respect to (1) assaults on U. A. W.[1] organizers by certain employees of petitioner on May 26 and May 27, 1937; (2) the distribution by petitioner in April and May, 1937, of two pamphlets which criticized and disparaged labor organizations; (3) the circulation, on or about June 1, 1937, of a so-called "Vote of Confidence" in petitioner's River Rouge plant in Dearborn, Michigan, and the publicizing thereof; and (4) the discharge between February and June, 1937, of 24 out of the 80,000 employees at petitioner's River Rouge and Highland Park plants because of their U. A. W. membership, activities or sympathy. Its order directed petitioner to cease and desist, to post notices, and to reinstate the 24 employees with back pay (R. Vol. V, pp. 357-359).

The Board petitioned the court below for enforcement of its second order (R. Vol. VI, p. 365). Petitioner by answer and cross-petition challenged the validity of the order for errors of law, for lack of the requisite evidentiary support for its findings, and for failure to accord petitioner the full and fair hearing required by the Act and due process of law (R. Vol. VI, p. 373).

The court below held that the distribution of the pamphlets did not constitute an unfair labor practice and set aside the portion of the Board's order based thereon; con-

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[1]United Automobile Workers of America (C. I. O.), the complaining union.

cluded that the Board's findings as to one of the twenty-four men were not supported by evidence and modified the order of reinstatement accordingly; modified the provisions of the order relating to back pay to accord with the decision of this Court in *Republic Steel Corp.* v. *N. L. R. B., supra,* with respect to work-relief funds; and, except as thus set aside and modified, decreed enforcement of the Board's order (R. Vol. VI, p. 629).

1. All of the events dealt with in the Board's decision took place between February and June, 1937, during and shortly after the spectacular U. A. W. sit-down strikes at the General Motors and Chrysler automobile plants in Michigan from December, 1936, to April, 1937.[1] Those strikes and repeated public threats of U. A. W. and C. I. O. leaders during and after them presaged a like violent and lawless seizure of petitioner's plant,[2] and those strikes as well as others in Michigan during this "greatest industrial conflict of all time"[3] demonstrated, as the court below recognized (R. Vol. VI, p. 618), that a small minority of employees could, with the aid of invaders from outside, forcibly take control of an industrial plant, with resultant stoppage of production and unemployment for all employees, and that regular law enforcement agencies would be unwilling to take the drastic measures necessary to evict the sit-downers.[4]

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[1]R. Vol. VI, p. 618; see also *id.* pp. 430-435.

[2]R. Vol. VI, pp. 618-619; see also *id.* pp. 432-434.

[3]The court below pointed out that the sit-down strikes in the automobile industry were so described by the then Governor of Michigan, now Mr. Justice Murphy (R. Vol. VI, p. 618; see The New York Times, Jan. 12, 1940, p. 1).

[4]These characteristics of the sit-down strikes were graphically portrayed in this Court's decision in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 482.

The court below took cognizance of these facts in its opinion and stated that petitioner "had reason to fear that there would be an attempt to seize the gates of the River Rouge plant and to invade it for the purpose of staging a sit-down strike" (R. Vol. VI, p. 619).[1]

With respect to the discharges, the court below held that upon the conflicting evidence as to the reasons for the discharges[2] it was, regardless of its own opinion as to the weight of the evidence, obliged to accept, as supported by evidence, the Board's findings as to 23 of the men that they were discharged because of their U.A.W. membership or activities (R. Vol. VI, p. 627). The court disregarded petitioner's contention that, even if the Board's findings were thus accepted, as a matter of law the discharges were not an unfair labor practice because an employer may discharge persons belonging to an organization which he has reason to fear will attempt to seize his plant by force and violence. Since the court itself recognized that petitioner did have reason to fear that the U.A.W. would attempt such a seizure of petitioner's plant, its decree enforcing the Board's order as to the 23 men constitutes a holding that it is an unfair labor practice for an employer to discharge

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[1]The threat of a sit-down strike, and the apprehensions of both petitioner and its employees of such a strike, appeared from evidence in the record offered by the Board itself. R. Vol. I, pp. 598, 617-618, 671, 696-697, 702, 713, 728, 740; R. Vol. II, pp. 938-941, 1094-1095; R. Vol. III, p. 2083; Board's exhibits 106-115, R. Vol. IV, pp. 85-103; see also Board's exhibits 96 and 99, filed as original exhibits.

[2]With respect to most of the discharges, the evidence consisted of testimony of the employees that they had been discharged for union membership or activities, and testimony of their foremen that they had been discharged for poor workmanship, fighting, failing to report to work and other misconduct. See R. Vol. V, pp. 324-355.

persons belonging to an organization which is committed to the policy of sit-down strikes and which the employer has reason to fear will attempt to seize his plant by force and violence.

2. The threat of a seizure of petitioner's plant by the U. A. W., the apprehensions thereof by petitioner and of such of its 80,000 employees as were opposed thereto, and the preparations of petitioner to resist invasion from without or seizure from within, were material to all the issues presented, which, as the Board itself recognized,[1] required that inferences as to both evidentiary and ultimate facts be drawn from circumstantial evidence and that conflicting evidence be resolved in the light of all surrounding circumstances. Yet the Board affirmed the Examiner's exclusion of evidence as to such matters,[2] rejected petitioner's offers of proof thereof,[3] denied petitioner's requests for findings thereon,[4] made no reference thereto in its decision,[5] grossly misstated petitioner's contentions so as to conceal their basis in the sit-down strikes,[6] and throughout presented the evi-

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[1]Thus in its decision the Board itself made findings as to the "background" of the alleged unfair labor practices and as to other matters of a circumstantial nature (R. Vol. V, pp. 291-293, 313-314, 322), and the Board expressly based findings as to particular issues upon "the entire record in the case" and "all the evidence in the case" (R. Vol. V, pp. 338, 340, 342, 344).

[2]R. Vol. I, pp. 134-136; pp. 600-601; Vol. V, p. 286.

[3]R. Vol. V, pp. 141-145, 149-247, 269.

[4]R. Vol. V, pp. 96-97, 104.

[5]The words "sit-down strike" appear only once in the Board's decision, in a quotation from certain literature (R. Vol. V, p. 291).

[6]Compare, for example, the fantastic contentions as to the assaults attributed by the Board to petitioner in its second decision (R. Vol. V, p. 317) with respondent's exceptions to the proposed decision (R. Vol. V, pp. 110-112, excep-

dence so as to suggest that any expressions of Mr. Ford or petitioner critical of unions and any preparations by petitioner to use force against the U. A. W. were necessarily directed at lawful union activities, and that any activities of any of petitioner's 80,000 employees indicating opposition to the U. A. W. must have emanated from petitioner rather than from the employees themselves.[1] The Board's action in all these respects can be explained only on the ground that it entertained some erroneous theory as to the facts or as to its duties under the Act which it believed to justify the complete disregard of facts and circumstances which were material to the issues presented.

The court below took judicial notice of the facts thus disregarded by the Board and recognized that they were material to the issues presented.[2] It nevertheless denied petitioner's petition to adduce additional evidence as to such matters and sustained, with modifications, the Board's order,[3] concluding that if the facts erroneously disregarded were taken into consideration there was nevertheless evidence to support the Board's findings.[4]

The court below thus in effect held that, although the Board had itself failed to consider facts and circumstances

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tions 93, 94, 95, 103 and 104; R. Vol. V, pp. 92-93, 95, 96-97, 98, 100, 109-110). Compare, also, R. Vol. V, pp. 291-293, 319-322, with R. Vol. V, pp. 95, 99.

[1] R. Vol. V, pp. 291-293, 309-324.

[2] R. Vol. VI, pp. 617-619.

[3] R. Vol. VI, p. 629; see *id.*, pp. 428-559.

[4] The court's reasoning on the issue of the Board's failure to consider material facts and circumstances required to be considered and refusal to take evidence thereof was not expressly stated, but its opinion considered as a whole seems clearly to have been predicated upon the reasoning stated above.

required to be considered because material to the issues presented and had excluded evidence thereof, and although the court itself had no power to weigh and appraise the evidence in the light of all material facts and circumstances and to reach its own conclusions as to the weight of evidence, the manner of resolving conflicting evidence, and the inferences to be drawn from evidence, nevertheless the findings of the Board should be sustained if supported by evidence within the meaning of Section 10(e) of the Act.

3. With respect to the assaults which a few of petitioner's 80,000 employees committed on May 26, 1937, on U. A. W. organizers (who, while apprehensions of an attempted invasion and seizure of its plant were greatest,[1] visited the gates of petitioner's plant for the ostensible purpose of distributing U. A. W. literature and whose leaders —although having no literature to distribute[2]—mounted the overpass leading to the main gate of the plant[3]), the Board found in its first decision that petitioner had "deliberately planned and carried out" the assaults in order to "crush union organization among its employees" (R. Vol. III, p. 2114).

The Board eliminated such findings from its second decision, made none of a similar nature, and thus sustained petitioner's contentions that such findings were without substantial evidentiary support. In its second decision the Board concluded that petitioner was "responsible" for the assaults, and that the assaults constituted an unfair labor

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[1]R. Vol. VI, p. 619; see also *id.* pp. 434, 545-546.
[2]R. Vol. I, p. 110.
[3]R. Vol. I, pp. 110, 163.

practice by petitioner (R. Vol. V, pp. 309, 315, 319), but it did not reveal the theory on which it reached such conclusions, and it made no findings of ultimate fact from which such conclusions would follow under the theory of *respondeat superior* urged in its briefs below[1] or under any other theory. The court below nevertheless sustained such conclusions and enforced the provisions of the order based thereon.

4. Throughout the hearing for the taking of evidence, the Trial Examiner openly manifested an unmistakable bias and prejudice in favor of the complaining union and against petitioner. He questioned interested and friendly U. A. W. witnesses with leading and sympathetic questions for the plain purpose of eliciting only such testimony as would help the Board's case.[2] He questioned petitioner's witnesses with

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[1]Of the ten individuals for whose acts petitioner was held "responsible", two are referred to in the findings merely as "foremen"; some as "service men"; and others merely as "employees" (R. Vol. V, pp. 314-315), with no other indication of the nature of their employment and no finding that the acts of any one of them, attributed to petitioner, were the kind he was employed to perform, or incurred substantially within the authorized time and space limits, or were actuated in any part by a purpose to serve petitioner (see Restatement of Agency, § 228). Indeed, the Board's emphasis upon the severity of some of the assaults, upon the nature of the injuries received, and upon the fact that most of the assaults took place on public highways, would weigh strongly against a finding that any of the individuals were acting within the scope of an employment by petitioner (*id.*, comments to §§ 229 and 235), even if, despite the extraordinary situation out of which the assaults arose, the doctrine of *respondeat superior* were strictly applicable in this proceeding under the Act.

[2]R. Vol. I, pp. 96-99, 117, 229-230, 285-286, 355-357, 372-375, 395-397, 438, 444, 455-456, 478-480, 503, 527, 544-546, 551, 559-561, 561-565, 585-586, 610-611, 696, 717-720, 749,

open hostility and contempt, subjecting them to cross-examination at least as bitter and unfair as the Board's own prosecuting attorneys.[1] He abused counsel for petitioner, arbitrarily discriminated against it in his rulings on evidence, unfairly restricted the scope of petitioner's examination to exclude relevant testimony which might be favorable to petitioner, and in various other ways sought to hinder and impede the presentation of petitioner's case.[2] His course of conduct throughout the hearing was plainly such as to induce Board witnesses to exaggerate and embroider their testimony, to intimidate witnesses called by petitioner and discourage them from giving testimony in its behalf, and to hinder and discourage petitioner's counsel in the presentation of petitioner's case.

Petitioner duly moved to suppress the evidence by reason of the Examiner's misconduct (R. Vol. V, p. 79),

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751-752, 754-755, 779-780; R. Vol. II, pp. 802-803, 805-806, 809, 828, 848-851, 871-872, 886-888, 903-904, 925-926, 942-943, 958-959, 969, 977, 1008-1010, 1019-1020, 1033, 1087-1089, 1139, 1158, 1193-1197, 1214-1216, 1240-1242, 1255-1257, 1272-1274, 1288-1290, 1301-1302, 1316-1318, 1319; R. Vol. III, p. 2032.

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[1]R. Vol. II, pp. 1386-1389, 1399-1401, 1440-1445, 1458, 1498-1502, 1525-1530, 1542; R. Vol. III, pp. 1564-1565, 1587, 1592-1593, 1650-1651, 1669-1670, 1678-1679, 1690, 1694, 1697, 1698, 1741, 1762, 1765, 1776, 1778-1780, 1856-1857, 1880, 1884, 1920-1921, 1944, 1985, 1993, 1995.

[2]R. Vol. I, pp. 46-47, 70, 130, 134-135, 136, 140, 141, 151, 152, 172, 177, 200-201, 205, 234, 287, 304-307, 308-309, 336, 367, 392, 527, 588-590, 599, 600, 600-601, 602, 637-638, 645, 647, 660, 695-696; R. Vol. II, pp. 818, 820, 863-864, 888, 944, 1012, 1019-1020, 1306, 1323, 1364, 1415, 1416-1429, 1430, 1441, 1443, 1452, 1453, 1457, 1458, 1469-1470, 1498; R. Vol. III, pp. 1553, 1564-1565, 1566, 1568, 1587, 1593, 1603-1604, 1622, 1650-1651, 1669-1670, 1690, 1693, 1694, 1695, 1696-1697, 1698, 1700, 1701, 1702, 1720, 1724, 1741, 1744-1745, 1746, 1748, 1763, 1776, 1801, 1808, 1843, 1854, 1860-1861, 1880, 1892, 1893, 1920-1921, 1955, 1975-1978, 2061, 2063.

and in its exceptions to the proposed decision directed the Board's attention again to such misconduct (R. Vol. V, pp. 86-89). The Board denied the motion, without opinion or explanation (R. Vol. V, p. 84), and overruled the exceptions (R. Vol. V, p. 288).

With respect to the Examiner's misconduct, the court below said that he

> "overstepped the bounds of that judicial propriety which contestants have a right to expect not only from the courts but from administrative tribunals, and is so conducive to public confidence in their adjudications, and that he manifested a peculiar concept of the nature of the judicial function he was called upon to exercise" (R. Vol. VI, p. 615).

The court below also recognized in its opinion "the inevitability of substantial prejudice [where "impropriety appears"], even though incapable of precise exposition" (R. Vol. VI, p. 616). It nevertheless declined to set the order aside by reason of the misconduct of the Trial Examiner.

5. In its answer and cross-petition in the court below petitioner alleged that the order was invalid by reason of failure of the Board itself to accord to petitioner a full and fair hearing and to reconsider the case as required by the order of remand[1] (R. Vol. VI, pp. 377-387). It alleged *inter*

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[1]The order of remand, affirmed by this Court, provided: "The motion of respondent [the Board] filed June 2, 1938, to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, is granted." See transcript of record in *Ford Motor Co.* v. *N. L. R. B., supra,* at p. 108.

alia that the Board, without considering the evidence or petitioner's exceptions or brief, had adopted as its own a decision proposed by its subordinates without affording petitioner any opportunity to be heard thereon (R. Vol. VI, pp. 382-385); that, in reaching its decision, the Board and its subordinates relied upon *ex parte* information and reports received from persons who acted as prosecutors in the proceeding and from other persons and that in other respects the exercise of the Board's prosecuting and judicial functions were intermingled (R. Vol. VI, pp. 385-386); and that by press releases of the Board and public statements of a member of the Board and its general counsel the Board, prior to affording petitioner any purported hearing upon the proposals of its subordinates, revealed a fixed bias and prejudice against petitioner and a determination to accord to petitioner only the forms of a hearing for the purpose of making a formal record to sustain an order against petitioner (R. Vol. VI, pp. 379-381).

These allegations were substantially similar to those contained in petitioner's answer and cross-petition in the previous case, of which this Court said, in *Ford Motor Company* v. *National Labor Relations Board,* 305 U. S. 364, 372, that the grounds asserted were "sufficient for setting aside the order". In the exercise of its right to obtain a trial upon this justiciable issue, the petitioner made three motions in the court below:

(1) A motion to compel a reply, the purpose of which was, if possible to define and limit the issues by removing therefrom any undisputed issues of fact (R. Vol. VI, p. 401).

(2) Two motions to require the Board to supplement the record by certifying and filing with the

court, as a part of the record, all reports, findings and communications prepared for the use of the Board, or made to or received or considered by the Board or its subordinates, in deciding the case (R. Vol. VI, pp. 421, 561).[1] The purpose of these motions was to compel obedience to the statutory requirement that the whole record should be certified to the court, and also to limit and narrow the issues on the ultimate issue of a full and fair hearing by the incorporation in the record itself of such findings and communications.

(3) A petition to take the depositions of members of the Board and certain employees thereof who took part in the decision of the case or appeared to have knowledge of the matters alleged (R. Vol. VI, p. 601).

These motions were supported by an affidavit (R. Vol. VI, p. 558; see R. Vol. VI, p. 610) setting forth verbatim statements made by a member of the Board, and by competent persons friendly to the Board, purporting to be based upon statements made by members of the Board and its staff, descriptive of the procedure followed by the Board generally, and particularly of the functions and activities of its so-called review section (R. Vol. VI, pp. 567-568, 584-587). The affidavit also set forth verbatim extracts from press releases of the Board and statements made by a member of the Board and its general counsel, prior to the decision of the case by the Board, revealing both prejudgment and prejudice (R. Vol. VI, pp. 570-573, 587-590, 592-598).

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[1]Petitioner made a similar motion before the Board after oral argument and before decision (R. Vol. V, p. 281), which motion the Board denied (*id.*, p. 282).

The affidavit also set forth extracts from testimony given before a House Committee by members of the Board's review section, including one of the review attorneys in this case, descriptive of the procedure followed by the Board in the decision of cases, of the powers delegated by the Board to its subordinates, and of their use in their work of "informal files" and other prejudicial *ex parte* communications (R. Vol. VI, pp. 574-583, 598-601).

The statements contained in this material, made or endorsed by members of the Board and its staff, constituted *prima facie* support for the allegations of petitioner's answer and cross-petition, and constituted reasonable grounds for belief that the Board—doubtless through a misconception of its powers and the limitations thereon—had failed to accord to the petitioner that full and fair hearing required by the Act and the due process clause as defined in prior decisions of this Court and had failed to reconsider the case as required by the order of remand.

The court below overruled each of said motions. By so doing it effectively prevented petitioner from obtaining a trial upon the justiciable issue presented by allegations already declared by this Court to afford, if true, a sufficient ground for setting aside the Board's order.

6. It appeared from the record certified by the Board and filed with the court below that, whether or not the Board had delegated any of its functions to its subordinates, the purported findings and order of the Board, which bear at the end thereof the names of two of the three members of the Board (R. Vol. V, p. 359), were never considered and adopted by the Board as a board. The record filed with the Board's petition to enforce its first order

was certified to be "the entire record" of the proceedings before the Board (R. Vol. I, p. 1), and the supplemental record filed with the Board's petition to enforce its second order was certified to "constitute a fully [*sic*] and accurate record" of the proceedings had subsequent to the remand of the case to the Board (R. Vol. V, p. 1). The entire record as thus certified includes seven orders of the Board preliminary to its final decision and order on the merits of the case, each of which is preceded by a recital that the ruling set forth therein was made at a meeting of the Board, and stating the time and place of the meeting and the members of the Board present thereat.[1] Yet the entire record contains nothing whatever to indicate that the decision and order itself was ever adopted, or the case ever considered or decided on the merits, by the Board at any meeting thereof.

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[1]For example, immediately preceding the Board's purported decision and order is an order of the Board denying petitioner's motion to supplement the record as to the procedure of the Board, which order is prefaced as follows (R. Vol. V, p. 282):

> "At a regular meeting of the National Labor Relations Board, held at its office in the City of Washington, D. C., on the 18th day of May, 1939. Present:
>
> J. Warren Madden, Chairman,
> Edwin S. Smith."

Identical recitals precede (1) Order transferring the proceeding to the Board (R. Vol. III, p. 2093); (2) Order setting aside the Board's first decision and order (R. Vol. V, p. 5); (3) Order directing the issuance of proposed findings (R. Vol. V, p. 6); (4) Order denying motion to suppress evidence taken before the examiner (R. Vol. V, p. 84); (5) Order denying motion to permit further evidence to be adduced (R. Vol. V, p. 269); and (6) Order granting permission to Ford Brotherhood of America, Inc., to file brief (R. Vol. V, p. 273).

Despite this state of the record and the failure of the Board to supplement the record with any showing that its order was made at a meeting of the Board (although it had supplemented the record to supply other deficiencies therein[1]), the court below enforced the order and thus, although its opinion is silent on the matter, in effect held that it is unnecessary that the Board as a board give consideration to the issues involved in the case, but that it is sufficient if two of the three members thereof subscribe their names to a purported decision and order not adopted at any meeting of the Board.

SPECIFICATION OF ERRORS

The errors which petitioner will urge if the writ of certiorari be granted are that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In enforcing the Board's order, as modified.

2. In refusing to hold that the discharge of the 23 men (ordered to be reinstated by the Board's order, as modified) because of their membership in, activity on behalf of, or sympathy with, an organization which petitioner had reason to apprehend would attempt to seize petitioner's plant by force and violence did not constitute an unfair labor practice.

3. In refusing to set aside the Board's order on the ground that the Board failed to consider facts and circumstances required to be considered.

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[1]R. Vol. I, p. 4; R. Vol. V, p. 361.

4. In refusing to set aside the Board's order, in so far as based upon the conclusion that petitioner was responsible for assaults, upon the ground that the Board's findings failed to embrace the basic facts needed to sustain such conclusion or to reveal the theory on which such conclusion was reached.

5. In refusing to set aside the Board's order on the ground that petitioner was denied a full and fair hearing by reason of the misconduct of the Trial Examiner.

6. In holding, in effect, that petitioner's allegations as to the Board's procedure in reaching its decision failed to allege facts sufficient for setting aside the Board's order and failed to raise a justiciable issue which it was the duty of the court to decide.

7. In denying petitioner's motion for an order directing the Board to reply to the affirmative allegations of petitioner's answer and to answer the affirmative allegations of petitioner's cross-petition.

8. In denying petitioner's motion for an order directing the Board to supplement the record.

9. In denying petitioner's motion for an order directing the Board to certify and file additional parts of the record.

10. In denying petitioner's petition for a commission to take the depositions of witnesses.

11. In refusing to set aside the Board's order by reason of the failure of the Board to consider and adopt its decision and order at a meeting of the Board.

12. In refusing to set aside the Board's order by reason of the Board's publicly revealed prejudgment of the issues and failure to "reconsider" the case as required by the order of remand.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice for an employer to discharge employees because of their membership in an organization which the employer has reasonable grounds to apprehend will attempt to seize his plant by force and violence in order to inaugurate a sit-down strike.

2. Whether upon review of an administrative order the reviewing court, upon finding that the administrative body has failed to consider material facts and circumstances which it should have considered, may nevertheless enforce the administrative order if it appears to the court that the administrative findings are "supported by evidence."

3. Whether an employer may be held to have engaged in unfair labor practices by reason of unlawful acts of his employees, where the Board has made no basic findings of fact or revealed no theory to support its conclusion that such acts constituted an unfair labor practice by the employer.

4. Whether a sustained course of misconduct by a Trial Examiner, such as occurred in this case, constitutes a denial of a full and fair hearing.

5. Whether allegations such as petitioner has made with respect to the Board's procedure in reaching its de-

cision in this case, where supported by a showing of reasonable grounds for such allegations, are sufficient, if shown to be true, for setting aside the Board's order and raise a justiciable issue; and, if so, whether, in a proceeding to review such order, the court may refuse to grant any interlocutory relief to bring about a determination of such issue.

6. Whether the Board may make a decision and issue an order by the action of two of its members, not taken at any meeting of the Board.

7. Whether a full and fair hearing, as required by the Act and due process of law, is denied, and a court order requiring an administrative body to reconsider an entire case is violated, where, by public press releases and statements by and on behalf of such body prior to any such reconsideration, it reveals a prejudgment of the issues in the case and a determination to grant the forms of a hearing only in order to make a record to sustain an order against the respondent in the proceeding.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. That part of the Board's order, sustained by the court below, of the most immediate public importance, is the requirement that petitioner reinstate with back pay the 23 out of petitioner's 80,000 employees found by the Board to have been discharged in 1937 for union activity or membership.

The question is of importance not because of the number of men or the amount of back pay involved, but by reason of the principle involved. Petitioner's witnesses testified before

the Board that these men were discharged, not for union activity or membership, but for poor workmanship, fighting, failure to report to work, and other misconduct. The Board, however, found differently, and the court below found the evidence sufficient to sustain the findings made. The U. A. W., to which these men belonged, was then committed to a sit-down strike policy, which it had carried out with violence in other automobile plants in the Detroit district and had threatened to use against petitioner. The court below found that petitioner's apprehensions that the union would employ a sit-down strike against petitioner and attempt the forcible seizure of its plants were well grounded. (See *supra,* pp. 4-6). The question is therefore presented whether an employer may discharge employees belonging to an organization committed to such a policy and making such threats, as a measure of protection, or whether he must sit idly by and permit the union to attempt, if not accomplish, the seizure of his plant by force and violence.

In *N. L. R. B.* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 253, this Court described such strikes as illegal, and said that to condone them "would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." It sustained the right of the employer to discharge persons who had participated in such a strike.

In *Peninsular & Occidental S. S. Co.* v. *N. L. R. B.,* 98 F. (2d) 411 (C. C. A. 5), sit-down strikes had occurred on two of the Company's ships, but the dispute had been settled, and the ships had resumed their regular schedules, after which the entire crews of both ships were discharged. The court set aside an order of the Board directing their reinstatement, upon the ground that apprehensions of re-

newed sit-down strikes constituted a valid ground for discharge.[1]

On the facts recited, it is believed that the opinion of the court below is in conflict with the decisions of this Court and of the Circuit Court of Appeals for the Fifth Circuit cited above. See also *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 132; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 482. If not, the court below decided an important question of Federal law which should be settled by this Court. The right of an employer to take precautions against violent seizure of his property or the use of sit-down or slow-down strikes inside the plant is of particular importance in the present national emergency.

2. In enforcing the Board's order and denying petitioner's petition to adduce additional evidence, although the Board had failed to consider facts and circumstances required to be considered because material to the issues presented and had excluded evidence and rejected offers of proof thereof, and although the court itself was without power and did not purport to weigh and appraise the evidence *de novo* in the light of the facts and circumstances which the Board disregarded, the court below decided an important question of Federal law in a way probably in conflict with decisions of this Court wherein it was held that where an administrative tribunal failed to consider material facts and circumstances, its order should be

[1]The court in that case held that evidence ignored by the Board showed apprehension on the part of the Company of further sit-downs. In the instant case the court below has held that the petitioner's apprehensions that the U. A. W. would stage a sit-down strike at its plant and attempt its forcible seizure were well grounded.

set aside and the case remanded to such tribunal for further consideration. *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461, 487; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 239; *West* v. *Chesapeake & Potomac Telephone Co.,* 295 U. S. 662, 674; *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Commission of Idaho,* 274 U. S. 344, 352; *Northern Pacific Ry. Co.* v. *Department of Public Works of the State of Washington,* 268 U. S. 39, 45; *Chicago Junction Case,* 264 U. S. 258, 265. Indeed, it is elemental that the finding of ultimate facts, after consideration of all material facts and circumstances, is for the administrative tribunal and not for the court. By the course pursued, the court below deprived petitioner of its right to have the issues determined upon a weighing and appraisal of all material facts and circumstances and to adduce evidence as to such facts and circumstances.

3. In sustaining the Board's conclusion that petitioner engaged in an unfair labor practice by reason of the assaults committed by certain of its employees, although the Board had eliminated its previous finding that petitioner had planned such assaults and although the Board had made no basic findings of fact to support its conclusion and had revealed no theory by which its conclusion could be sustained, the court below decided an important question of Federal law in a way probably in conflict with the decisions of this Court in *Florida* v. *United States,* 282 U. S. 194, 215; *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 86; *United States* v. *Chicago, M. St. P. & P. R. Co.,* 294 U. S. 499, 510-511; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 295 U. S. 193, 201-202. In those cases

this Court set aside administrative orders because of disregard of the fundamental requirement that "findings based on the evidence must embrace the basic facts which are needed to sustain the order" (*Morgan* v. *United States,* 298 U. S. 468, 480; see *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 74.) If the action of the court below was not so in conflict, it decided an important question of Federal law which has not been but should be settled by this Court.

4. In failing to hold that the Examiner's misconduct constituted a sufficient ground for setting aside the order, the decision of the court below is in conflict with the decisions of the Circuit Court of Appeals for the Seventh and Eighth Circuits in *Inland Steel Co.* v. *N. L. R. B.,* 109 F. (2d) 9, and *Montgomery Ward & Co.* v. *N. L. R. B.,* 103 F. (2d) 147. In those cases, as in this case, the Examiner did not participate in the decision. Those courts nevertheless set the order aside by reason of the "inevitability of substantial prejudice" (arising from misconduct of the Examiner, substantially similar to that disclosed in this case), even though "incapable of precise exposition", a doctrine which the court below recognized (R. Vol. VI, p. 616) but failed to follow. The grounds upon which the court below seeks to distinguish between these cases are untenable, or if not, at least raise such doubt as to justify this Court in assuming jurisdiction for the purpose of bringing the decisions of the several Circuits into harmony.

The decision of the court below is also in probable conflict with the decisions of this Court in *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U. S. 292, 304-305; *Tumey* v. *Ohio,* 273 U. S. 510, 522; and *Jordan* v. *Massachusetts,* 225 U. S. 167, 176.

In *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra,* this Court ruled that the exemption of administrative tribunals from "supervision" in the "realm of administrative discretion" makes it all the more essential that in proceedings before such tribunals the " 'inexorable safeguard' * * * of a fair and open hearing be maintained in its integrity", a principle with which this Court said "there can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

As stated by the court below (R. Vol. VI, p. 615), the Examiner "overstepped the bounds of * * * judicial propriety" required to be exercised not only by the courts but by "administrative tribunals", and "manifested a peculiar concept of the nature of the judicial function he was called upon to exercise", giving rise to the inevitability of substantial prejudice hereinbefore noted and referred to by the court. Indeed, as stated by the court below, the Board itself did not "condone his lapses" (*id.,* p. 615). In failing to set the decision aside by reason of such misconduct running through the entire hearing, the court below failed to apply the principles recited by this Court in the cases cited.

If the decision of the court below is not in conflict with the decisions cited above, that court, in failing to hold that the Examiner's misconduct constituted sufficient ground for the setting aside of the order, sanctioned such a departure by the Board from the accepted and usual course of judicial proceedings and the fundamental requirements thereof, as to call for the exercise of this Court's power of supervision.

5. In denying (a) petitioner's motion to compel a re-ply to its answer and cross-petition, (b) petitioner's two notions to supplement the record, and (c) petitioner's peti-ion to take depositions, the action of the court below was n probable conflict with the decisions of this Court in *Morgan* v. *United States,* 298 U. S. 468, 304 U. S. 1 (re-earing denied, 304 U. S. 23), and in *Ford Motor Co.* v. *N. L. R. B.,* 305 U. S. 364. See also *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra.* If not in con-flict with the foregoing decisions, the court below in thus disposing of petitioner's motions decided an important ques-ion of Federal law which should be settled by this Court, nd so far departed from the accepted and usual course of udicial proceedings as to call for an exercise of this Court's ower of supervision.

The ultimate facts set forth in those allegations of etitioner's answer and cross-petition in which it alleged that he Board had failed to accord to it that full and fair hear-ng required by the Act and by the Fifth Amendment were ubstantially similar to the ultimate facts pleaded in *Morgan . United States, supra,* in which this Court held that the ailure of the court below to accord to the appellants in that ase a trial on the issue raised thereby constituted error. he specific allegations in this case are also substantially the me as those contained in the answer and cross-petition petitioner in *Ford Motor Co.* v. *N. L. R. B., supra,* hich this Court stated set forth grounds "sufficient for tting aside the order". The effect of the action of the wer court was thus to deny to petitioner a trial upon sues twice declared by this Court to be justiciable and to quire trial.

The allegations to which the motions and petition were rected, although made on information and belief, as they

were of necessity required to be, and as they were in the two cases hereinbefore cited, were supported by an affidavit containing statements emanating directly or indirectly from members of the Board and its employees, including sworn testimony before a Congressional Committee, which afforded probable cause for the information and belief upon which such allegations were made (see *supra,* pp. 13-14). By the motions made, petitioner sought to reduce to a minimum the interference with administrative process (1) by moving to compel a reply, which, if granted, would have limited and defined the issues to those allegations of fact controverted by such reply; (2) by moving to supplement the record by the certification of such additional documents or material as the Board may have considered in its determination of the case; (3) by petition to take depositions, the scope of which —had the other motions been granted—would have been limited to the controverted issues of fact remaining.[1]

The rights protected by the several decisions in the *Morgan* case are fundamental rights and, as stated therein, the requirements of a full and fair hearing are requirements of substance and not of form. Unless the requirements of that case and the observations thereafter made

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[1]All of these motions were within the power of the court to grant and were appropriate to bringing about a determination of the issues presented. See *Ford Motor Co.* v. *N. L. R. B.,* 305 U. S. 364, 373; *Morgan* v. *United States,* 298 U. S. 468, 482; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 47; Revised Statutes, § 716, 28 U. S. C. § 377; Revised Statutes § 866 *et seq.,* 28 U. S. C. § 644 *et seq.* The denial of each and all of these requests for interlocutory relief can be explained only on the ground that the court erroneously entertained the belief that petitioner's allegations raised no justiciable issue.

by this Court in *Ford Motor Co.* v. *N. L. R. B.* are to become mere empty words, this Court should assume jurisdiction for the purpose of reviewing action by the court below, which had the effect of denying to petitioner a trial of justiciable issues upon a showing of the existence of probable cause.

6. In failing to hold that the Board's order should be set aside by reason of the Board's failure to consider the order and the findings of fact at a meeting of the Board, the Board decided an important question of Federal law which has not been but should be settled by this Court,[1] and sanctioned such a departure from the accepted and usual course of quasi-judicial administrative proceedings as to call for an exercise of this Court's power of supervision.[2]

The powers conferred upon the Board are conferred upon the Board as a board, not upon its members acting

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[1]The state courts have uniformly held that the powers conferred upon an administrative board may be exercised only at a meeting of such board. *Lawler* v. *Brennan*, 150 Wisc. 115, 136 N. W. 1058; *State* v. *Schuffenhauer*, 213 Wisc. 9, 250 N. W. 767; *P. & F. R. Ry. Co.* v. *Commissioners of Anderson County*, 16 Kan. 302; *Tarrant County* v. *Smith*, 1 S. W. (2d) 537 (Texas Civ. App.); *State* v. *Alexander*, 58 Miss. 557, 130 So. 754; *Prater* v. *Abernathy*, 160 Miss. 51, 134 So. 168; *Johnson* v. *Mayor and City Commission*, 4 La. App. 40, 129 So. 433; *Strong* v. *The District*, 4 Mackey 42 (D. C.); *Village of Bellwood* v. *Galt*, 321 Ill. 504, 152 N. E. 591; *Pugh* v. *School District*, 114 Mo. App. 688, 91 S. W. 471; *Gaston* v. *Ackerman*, 6 N. J. Misc. 694, 142 Atl. 45; *The People* v. *Walker*, 23 Barb. 304 (N. Y.).

[2]Thus, each order issued by the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission shows upon its face that it was made and entered at a meeting of the Commission. See such orders as reported in the Federal Register.

individually. In contrast with all preliminary action taker in the case, much of which was of a purely routine char acter, the record of the proceedings by the Board shows n consideration of its findings and order, at any session of th Board (see *supra,* p. 15). Such course of conduct woul appear to be contrary to the requirements of the Act an certainly constitutes a departure from recognized practic and procedure of other administrative tribunals.

7. In refusing to hold that the Board's bias and preju dice against petitioner and its prejudgment of the cas prior to hearing evidence or argument, as manifested by th press releases of the Board and the public statements o one of its members and its general counsel were such a to require the Board's order to be set aside on the groun (1) that the Board failed to reconsider the entire case a required by the order of remand and (2) that petitione was denied a full and fair hearing, the court below decide an important question of Federal law in a way probably i conflict with the applicable decisions of this Court in *For Motor Co.* v. *N. L. R. B.,* 305 U. S. 364, 376; *Morgan* v *United States,* 304 U. S. 1, 15; *Tumey* v. *Ohio,* 273 U. S 510, 522; *Jordan* v. *Massachusetts,* 225 U. S. 167, 176; an *Ohio Bell Telephone Company* v. *Public Utilities Commis sion,* 301 U. S. 292, 304. As stated in *Jordan* v. *Massachu setts* (p. 176), "Due process implies a tribunal both impar tial and mentally competent to afford a hearing", and i *Tumey* v. *Ohio* (p. 525), "No matter what the evidenc was against him, he had the right to have an impartia judge." And in affirming the order of remand of the pro ceeding to the Board for a "reconsideration of the entir case", this Court said that "What findings or order woul

thus [after the remand] be made became a matter of conjecture * * *", thus indicating that the proceedings to be taken by the Board were not to be a mere matter of form having as their predetermined purpose the issuance of a second decision and order adverse to petitioner after the making of a record which, in the opinion of the Board and its staff, would sustain such a decision and order.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding that court to certify and send to this Court, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, *No. 8399, National Labor Relations Board, Petitioner,* v. *Ford Motor Company, Respondent,* to the end that said cause may be reviewed and determined by this Court; that paragraphs 1 and 5 of the decree of said court referred to at page 1 hereof be set aside and reversed; and that petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

Dated, New York, N. Y., December 30, 1940.

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Attorneys for Petitioner,
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I. A. CAPIZZI,
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CLERK

Supreme Court of the United States

October Term, 1940

No. 661

FORD MOTOR COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1940

FORD MOTOR COMPANY,
Petitioner,
against
NATIONAL LABOR RELATIONS BOARD.

No. 661

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

(a) The discharges.

In our petition we have asserted that the right of an employer to take precautions against violent seizure of his property or the use of sit-down or slow-down strikes inside the plant, or against other acts of sabotage, including the right to discharge employees belonging to an organization committed to such unlawful activities, and threatening to engage in them, is a question of public importance, particularly in the present national emergency (Pet. 19-21).

The Board does not deny that the question presented is of sufficient importance to warrant review and determination by this Court. It argues only that the writ should be denied, in respect of this issue, because "the question is not involved" in the case; that the question involves an assumption that "petitioner either had reason to fear or did fear that the U. A. W. would attempt to seize its plant"; and that such an assumption is "unwarranted by anything in the record" (Br. 11). But neither the findings of the

Board or the evidence before it, nor the decision of the court below, supports the Board's contention.

On the contrary, the Circuit Court of Appeals, whose decision is the one of which we seek a review, expressly found that petitioner both had reason to fear and did fear such an attempt to seize its plant (R. VI, 619).

That finding is supported, and in fact compelled, by evidence in the record offered by the Board itself.[1] Indeed, Board's counsel themselves questioned witnesses at the hearing upon the obvious assumption that petitioner was apprehensive of such an attempt, and sought to extract from petitioner's witnesses the admission that the fear of a sit-down strike was the cause of discharges of men who belonged to the U. A. W.[2] Moreover, the Board's own witnesses supported their position that they had been discharged for union membership or sympathy by testimony indicating that the petitioner was apprehensive that such membership or sympathy made them potential sit-down strikers.[3]

The Board further contends that the right of an employer to discharge members of an organization publicly committed to violent and unlawful seizure of its plant is not involved in the case, because "the evidence introduced by

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[1]See petition, p. 5, f. n. 1.

[2]*E. g.*, R. III, 1700-1702.

[3]For example, one of the discharged men testified that the official who discharged him accused him of trying to "take this plant over and run it for us" (R. II, 1098), and another testified that he was accused of "trying to steer the trouble there like they had . . . over to General Motors and Chrysler" (R. II, 916). In fact, the Board's testimony as to one of the discharges would, if accepted, establish that the man was discharged because of petitioner's belief that he had ordered a sit-down strike to take place (R. III, 2083; see R. I, 696-697, 700, 702, 713).

petitioner was designed to prove a precisely contrary point, that the employees' union affiliation had nothing to do with their discharge" (Br. 12). But that evidence the Board itself rejected, and its findings to the contrary were deemed by the court below (except in respect of one employee) to have the requisite evidentiary support. The court having so held, we have not considered the issue one which under its rules we could properly ask this Court to review on certiorari.

Therefore we must accept the Board's findings that the petitioner discharged 23 men because of their membership in, activities on behalf of, or sympathy with, the complaining union; and it is upon such findings that the issue of law arises, since that union was (as indisputably appears, as was recognized by the court below, and as is entirely consistent with the Board's findings) an organization which petitioner had reason to fear would attempt to seize its plant.

The Board's attempted distinction of *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 305 U. S. 240, and other cases cited (Pet. 20-21), rests upon the assertion that petitioner was not actually apprehensive that the union or its members would attempt to engage in the unlawful activities condemned in those decisions (Br. 12-13). Since, as the Circuit Court of Appeals found, the petitioner did fear such an attempt, and had reason to fear it, the distinction falls.

(b) The Board's failure to consider material facts and circumstances.

In our petition we have contended that the court below, in refusing to set aside the Board's order because of its

failure to take into consideration material facts and circumstances, though the court itself recognized their materiality (R. VI, 617-619), decided an important question of law in a way probably in conflict with the applicable decisions of this Court (Pet. 21-22).

The Board does not deny that the question presented is of sufficient importance to warrant review. It argues, contrary to the decision of the court below, that the sit-down strikes and petitioners' apprehensions of, and preparations to resist, such a strike in its plant are immaterial to the issues (Br. 15-16); and it seeks to justify its failure to consider those facts and circumstances by arguing that there was in fact no threat of a sit-down strike at petitioner's plant and no fear on petitioner's part that such a strike might be attempted (Br. 13-15).

The latter contention is based upon evidence in the record alleged to establish (though the Board did not so find) that the U. A. W.'s threat of a sit-down strike ended with the decisions of this Court on April 12, 1937, upholding the National Labor Relations Act, and that after that date petitioner had no reason to fear and did not fear a sit-down strike in its plant.

Not only did the Board not so find, but the court below expressly found to the contrary, holding that as late as May 26, 1937, the day of the riot, petitioner "had reason to fear that there would be an attempt to seize the gates of the River Rouge plant and to invade it for the purpose of staging a sit-down strike" (R. VI, 619).

That the decisions sustaining the Act did not mark the end of the sit-down strikes is abundantly clear from *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 482, in which the Court described "a lawless invasion of petitioner's plant

and destruction of its property by force and violence of the most brutal and wanton character" occurring on May 4, 1937. The portions of the record cited by the Board (Br. 14-15) to support its argument merely confirm our position.[1] Indeed, evidence in the record, offered by the Board itself, shows that at petitioner's plant in Richmond, California, the U. A. W. inaugurated a sit-down strike on April 23, 1937, and on May 25, one day before the riot involved in the present case, seized the gates of that plant and excluded supervisory officials and office workers from the premises (Bd. Ex. 106; R. IV, 84).

That the sit-down strike epidemic continued, and extended from industry to industry, long after this Court's decision sustaining the Act, and ended only upon this Court's decision in *N. L. R. B.* v. *Fansteel Metallurgical Corp., supra,* are facts so notorious as to be within the scope of judicial notice (see R. VI, 434-435, 506-543).

The Board's more general argument—that the sit-down strikes and petitioner's apprehensions of, and preparations to resist, such a strike in its plant are immaterial to the issues—is sufficiently answered by the Board's own statement of the facts. Thus, in arguing in support of the conclusion that petitioner was "responsible" for the alleged

[1]Obviously, a newspaper reporter would not have questioned Mr. Henry Ford, after the Act was sustained by this Court, as to what the Company "would do in the event of a strike at the Rouge plant", if the threat of such a strike were not recognized as still existing. And the statement of the President of the U. A. W. that a "strike to force Henry Ford to recognize the Union will not be *necessary now*" was obviously an attempt to mislead employees into thinking that, because the Act had been sustained, the Company was *ipso facto* obliged to recognize the Union, regardless of the choice of a majority of the employees, and also necessarily implied that if such recognition were not granted forthwith, a strike would be "necessary".

assaults, the Board states that they were not a "spontaneous" outbreak and that, "For some time prior to May 26 petitioner had been aware that the U. A. W. intended to distribute leaflets *and had maintained a large number of guards at the plant gates* (R. V, 309)" (Br., 7).

This argumentative association of the plan of the U. A. W. to distribute literature and the maintenance of guards at the plant gates, as made in the Board's brief, epitomizes its entire decision, which discloses no reason whatever for petitioner to have maintained guards at the gates other than a purpose to interfere with the distribution of literature; whereas, in fact, the Board's own testimony shows that such guards were maintained at the gates long before the U. A. W. even contemplated distributing literature at the gates, and were maintained at all hours of the day and night, at times when the U. A. W. obviously would not attempt to distribute literature (R. I, 434; cf. R. V, 293).

Likewise, the argumentative statement that the assaults were not a "spontaneous" outbreak proceeds on the unspoken premise that, because no overt violence was attempted by the U. A. W. on May 26, there could have been no individual motivation for the extreme hostility to the U. A. W.'s visitation to the plant evinced by those employees of petitioner who participated in the riot, whereas it is clear that the lawless activities of the U. A. W., and its threat to interfere with the livelihood of Ford employees by a sit-down strike, furnished a very natural basis for resentment toward the U. A. W. on the part of some of those 80,000 employees.

It is obvious that the significance and probative force of almost every item of evidence dealt with in the Board's decision could be properly determined, and infer-

ences and conclusions could properly be drawn therefrom, only by considering the true background of sit-down strikes and judging the evidence—both as to petitioner's preparations to use force and the activities of individual employees hostile to the U. A. W.—in the light of that background.

It is the failure of the Board to consider that background—its studied refusal to make even the slightest reference to the sit-down strikes in either of its decisions—which the court below recognized as a failure to consider material facts and circumstances, and which raises the question upon which we seek a review, *viz.*, whether the court below in that situation was not required, as a matter of law, to set aside the Board's order.

(c) The Board's failure to make basic findings of fact.

In our petition we contended that, the Board having failed to make basic findings of fact necessary to support its conclusion that petitioner was "responsible" for assaults committed by certain of its employees, or to reveal the theory upon which such a conclusion was reached, the court below was required to set aside the Board's order, and was not justified in enforcing the order in the absence of such basic findings (Pet. 22-23).

The Board does not deny that its decision is barren of findings which would make applicable to petitioner the doctrine of *respondeat superior* (see Pet. 9). Nor does it deny that having stricken from its second decision the finding, contained in its first decision, that petitioner planned and intended the riot, its decision fails to indicate the basis for its conclusion that petitioner was "responsible". The Board merely argues that the "petitioner's responsibility is self-evident" (Br. 18).

The Board's inability or unwillingness to state the basis for its conclusion, even before this Court, strongly indicates that it regarded petitioner as "responsible" for the riot for the same reason that it regarded the sit-down strike background as immaterial to the issues, namely, the unexpressed theory that any activity of the petitioner, regardless of its occasion or purpose, which contributed to bringing about any impediment to the accomplishment of the U. A. W.'s objectives, regardless of their lawless nature, constituted an unfair labor practice. If such a theory, which appears to be the only one that reconciles all of the Board's action in the case,[1] had been expressed in its decision, its error would be obvious. But since the Board failed to express such theory or any other theory, or to make any basic findings of fact from which it would follow, without further inferences of fact and as a matter of law, that petitioner engaged in unfair labor practices by reason of acts of its employees, it is impossible to determine what theory the Board relied upon, or what inferences of ultimate fact it had in mind in reaching its conclusion.

The rule that findings must embrace the basic facts necessary to support the ultimate conclusions is thus peculiarly applicable, for it is impossible to determine from the Board's decision whether it decided the case on any theory which, if known to the Court, would be sustained.

(d) The Trial Examiner's misconduct.

In our petition we argued that the decision of the court below, in failing to hold that the Examiner's misconduct constituted a sufficient ground for setting aside the order,

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[1]See Pet. 6-7.

is in conflict with the decisions of other circuits in *Inland Steel Co.* v. *N. L. R. B.*, 109 F. (2d) 9, and *Montgomery Ward & Co.* v. *N. L. R. B.*, 103 F. (2d) 147.

The Board, while conceding that the conduct of the Examiner was not entirely proper, argues that petitioner nevertheless received a fair hearing, apparently on the theory that a party cannot be deprived of a fair hearing except by the exclusion of relevant evidence. But the Examiner did, in important respects, unfairly restrict the scope of petitioner's examination of witnesses for the plain purpose of excluding testimony which might be favorable to petitioner (*e.g.*, R. Vol. I, pp. 130, 134-5, 136, 172, 600-1). And the Board does not deny that the Examiner questioned interested U. A. W. witnesses in a highly improper fashion for the plain purpose of eliciting only such testimony as would help the Board's case,[1] or that he questioned petitioner's witnesses with open hostility and contempt,[2] or that he abused counsel for petitioner, arbitrarily discriminated against petitioner in his rulings on evidence, and sought in other ways to hinder and impede the presentation of petitioner's case.[3]

There can be no doubt that such conduct tended to encourage Board witnesses to depart from the truth, to intimidate petitioner's witnesses, and to hinder petitioner's counsel in the presentation of its case.

The Board also suggests (Br. 21) that the petitioner was not deprived of a fair hearing by the Examiner's misconduct, because the Examiner filed no intermediate report.

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[1]For record references, see Pet. 9, f. n. 2.

[2]For record references, see Pet. 10, f. n. 1.

[3]For record references, see Pet., p. 10, f. n. 2.

But the examiners in the *Inland Steel* and *Montgomery Ward* cases likewise filed no reports; and the prejudicial effect of encouraging witnesses to exaggerate and embroider their testimony, of intimidating petitioner's witnesses, and hindering petitioner's counsel in presentation of its case, can hardly be cured by the exclusion of the Trial Examiner from participation in the case after the hearing.

In contending that the petitioner may "not now be heard to urge that the hearing was unfair" for lack of objections (Br. 20), the Board gives the erroneous impression that petitioner's counsel did not object to the Examiner's conduct during the hearing. In fact, petitioner's counsel objected to different types of unfair conduct of the Examiner on numerous occasions, and in almost every instance in which he did so, his objections were abruptly cut off by the Examiner or summarily overruled.[1] Although the Board argued in the court below that "if appropriate objections had been made, it may be that the matters now complained

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[1]Thus petitioner's counsel objected to the Examiner's arbitrary restrictions upon the introduction of testimony as to the background of sit-down strikes and lawless conduct engaged in by the U. A. W., imposed during the initial stages of the hearing; in fact, even Board's counsel protested against the Examiner's arbitrary conduct in this respect (R. I, 134-135, 136, 172, 600-601). He objected or attempted to object to the manner of the Examiner's questioning of witnesses (R. I, 202; II, 1388-1389; III, 1778-1780); to the Examiner's abusive treatment of petitioner's counsel (R. I, 305, 695-696); to the Examiner's refusal to allow him to make objections during the examination of Board's witnesses, as well as to many other manifestly arbitrary rulings on questions of evidence (*e. g.* R. I, 305, 306-307, 308-309, 695-696; III, 1763, 1920-1921); and to the Examiner's bulldozing of petitioner's witnesses and his approval of similar tactics by Board's counsel (R. I, 184, 695; II, 1441-1443; III, 1553, 1669-1670, 1698, 1860-1861).

of would not have occurred," no such contention can reasonably be made. The Board's argument reduces itself simply to this point—that since no general motion was made before the Examiner that he should set aside the hearing because of his own unfair conduct, no objection thereto might thereafter be made. The Board does not suggest that the Examiner would have had any power to grant such a motion, or that he would have granted it if he had had such power. The proper place to urge such objections was before the Board, and the petitioner did make appropriate and timely objection before the Board, as has been shown (Pet. 10-11).

The court below, in remarking that "no motion to suppress evidence [was] made before the examiner or the Board prior to the announcement of the Board's original decision" (R. VI, 615), failed to consider the Board's own procedure and the rules and regulations which it had in effect at the time of the hearing and thereafter. Except in cases where it followed the procedure of its first decision in this case—a procedure now concededly improper—the Board's regulations provided that the trial examiner, after the close of the hearing, should issue a tentative or intermediate report; that the respondent should then, within 10 days, file its exceptions to such report and "to any other parts of the record (including rulings upon all motions or objections)."

Had the regular procedure been followed, instead of the erroneous procedure which led to the remand of the case and the making of a second decision, petitioner would have filed exception to the Trial Examiner's conduct as part of its exceptions to his report, and would have made timely request for relief based thereon. It was the Board's

attempt to "streamline" its procedure which deprived petitioner of an opportunity to make its objections before the Board itself at the usual time and in the normal way.

The Board apparently argues (Br. 21) that the *Inland Steel* and *Montgomery Ward* cases are entirely different from this one because the Examiner failed to manifest his bias in every single way specified in those decisions. Although the Board refers to several types of unfair conduct as having been present in those cases and states that "No such circumstances are present in the instant case" (Br. 21), the only type of conduct cited by it which is in fact not present in this case is the ordering of discussions off the record; and in neither such decision was any particular stress put upon that type of conduct. The hostile attitude toward respondent's witnesses, the imposition of arbitrary restrictions upon cross-examination and arbitrary distinctions and rulings upon questions of evidence were stressed in one or both such decisions; and those, and other types of unfair conduct as well, exist in this case. In those cases, the courts set the order aside by reason of the "inevitability of substantial prejudice" by reason of such a course of conduct—a doctrine which the court below recognized but did not follow.

(e) The Board's procedure in reaching its decision.

The Board seeks to justify the action of the court below in denying various motions of petitioner, and thus effectively preventing petitioner from obtaining a trial upon the justiciable issues raised by its answer and cross-petition as to the Board's procedure in reaching its decision, on two primary grounds: (1) that petitioner's allegations were not supported by any showing that the allegations had "any

basis in fact" (Br. 23), and (2) that any issue as to the Board's procedure in reaching its decision was foreclosed by the formal procedural steps taken by the Board after the remand of the case to it for reconsideration (Br. 25).

The first of these contentions disregards the fact that petitioner's motions were supported by an affidavit setting forth public statements made or endorsed by the Chairman of the Board and sworn testimony of members of its staff giving *prima facie*, and in some respects conclusive, support to petitioner's allegations that in this case the Board delegated the exercise of substantially all its judicial functions to subordinates, who reached their own determinations as to the facts after consideration not only of the formal record but also of the so-called "informal file", together with *ex parte* information as to the merits of the case obtained orally, and that the Board accepted such determinations of its subordinates without itself considering the evidence or petitioner's contentions (R. VI, 567-601).

The second of these contentions disregards the fundamental requirements of a full and fair hearing, as enunciated by this Court in its decisions in *Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1, and *Ford Motor Company* v. *N. L. R. B.*, 305 U. S. 364, and assumes that they relate to form and not to substance. It is apparently the Board's theory that because, after the remand, it issued a proposed decision and permitted petitioner to file exceptions and a brief addressed thereto and to make oral argument, the issue of fair hearing is foreclosed, even if all the allegations made by petitioner are true.

No doubt the issuance of a proposed decision (even though the Board had not itself considered the evidence)

and the receipt of exceptions thereto and of a brief and oral argument thereon were appropriate steps in the proceeding. But petitioner has alleged, and shown *prima facie* and in some respects conclusively, that thereafter the case was actually decided by unauthorized subordinates on the basis of both formal and informal files and other *ex parte* communications (Pet. 11-14). As this Court stated in *Morgan* v. *United States,* 304 U. S. 1, 20, "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." And in that case the Court further said that due process of law requires that, "Those who are brought into contest with the Government in a quasi-judicial proceeding * * * are entitled to be fairly advised of what the Government proposes *and to be heard upon its proposals before it issues its final command*" (p. 18). The Court was, of course, referring to a hearing upon the proposals by the official or body vested with the power of decision, and not by its subordinates.

The mere physical receipt of exceptions and a brief gave petitioner no "hearing" by the Board upon the proposals of the subordinates if, as petitioner has alleged, no member of the Board read or considered petitioner's exceptions or brief. And the physical act of listening to petitioner's oral argument, a transcript of which was then turned over to the subordinates who decided the case, like the physical receipt of exceptions and a brief, did not constitute a "hearing" on the proposed decision.

In its opinion on rehearing on the second appeal in the *Morgan* case (304 U. S. at p. 23), this Court reiterated its statement in its first opinion (298 U. S. at pp. 481-482)

that, "To give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them." And when this Court stated in the *Ford* case (305 U. S. at p. 372) that it was "sufficient for setting aside the order" that the Board *"had not considered the evidence and made its own findings,* but had adopted as its own a decision proposed by its subordinates without affording petitioner an opportunity *to be heard thereon",* it was obviously referring to a hearing in the substantive sense, as defined in both decisions in the *Morgan* case, and to a hearing by the Board and not by its subordinates.

If the procedure in fact followed was that which petitioner has alleged and shown *prima facie* to have been followed, petitioner, although advised of the proposals embodied in the proposed decision, was never accorded a "hearing" on them by the Board, and was neither advised of nor heard upon the proposals which were thereafter made by the Review Attorneys to the Board—which were the proposals upon which the Board's decision was actually based, and which were made only after consideration of highly prejudicial *ex parte* reports and communications from the prosecutors and other persons.

Petitioner does not contend that it was improper for the Board to have subordinates take the evidence, sift and analyze it, and prepare a proposed decision, or that it was necessarily the duty of the Board at any stage in the proceeding to read the evidence. It is petitioner's contention that, under the decisions of this Court in the *Morgan* and *Ford* cases, if the Board chose to have such assistance from its subordinates, it could not properly permit such sub-

ordinates to consider informal files and other written and oral *ex parte* communications from the prosecutors, and that the Board itself was required to consider the evidence and petitioner's exceptions and brief to the extent necessary to enable the Board itself to decide upon the validity of the contentions which the petitioner addressed to the proposals of the Board's subordinates. The determination of the facts upon consideration of evidence and argument is of the essence of the judicial function vested in the Board, and clearly may not be delegated to subordinates, particularly where the subordinates are permitted to consider *ex parte* reports from the prosecutors and other persons relating to the merits of the case.

f. *Failure of the Board to act at a meeting.* The Board erroneously states that there is nothing other than the "lack of a formal recitation" to indicate that the Board's final decision and order were not made at a meeting of the Board. It is shown in the petition (p. 15) that seven different interlocutory orders of the Board appear in the record to have been made at meetings of the Board, and that the Board failed to supplement the record to show that its decision and order were made at any meeting, although it had voluntarily supplemented the record to supply other defects therein. The Board points in its brief (p. 27) to several orders which do not recite that they were made at Board meetings, but all but one of the orders thus cited by the Board are orders signed only by the Secretary of the Board, relating to the time for argument and for filing briefs, and do not even purport to have been made by one or more members of the Board acting individually. The conclusion is thus inescapable from the record, and from the Board's

failure to supplement it, that, although interlocutory orders (other than purely ministerial acts of fixing dates for hearings and for the filing of papers) were made at meetings of the Board, the Board's decision and order were not made at any meeting of the Board, but merely by the individual acts of two of its members in signing their names to a piece of paper.

The Board, while not denying that all final orders of the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission show upon their face that they are made and entered at meetings of such commissions, asserts that orders of the Board of Tax Appeals and the National Mediation Board and the Federal Power Commission do not appear to be made at meetings. But the statutes under which both the National Mediation Board and the Board of Tax Appeals are established expressly provide for the exercise of the functions of such bodies by single members thereof. See Railway Labor Act, 45 U. S. C. § 154; Internal Revenue Code, 26 U. S. C. §§ 1103(c), 1117(a), 1118(a).

The Act not only provides that "the *Board* shall state its findings of fact and shall issue * * * an order * * *" (§ 10(c)), but also provides that two members of the Board shall constitute a quorum[1] (§ 3(b)), thus clearly revealing the Congressional intent that the Board shall act at meetings thereof, upon notice to all members, and not by the action of individuals, not taken at any meeting.

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[1]A "quorum" is "Such a number of the officers or members of any body as is, *when duly assembled*, legally competent to transact business." *Webster's Dictionary*. (Italics supplied.)

The Board's disregard of the fundamental requirement that an administrative body may act only at a meeting legally convened upon notice to all members, which requirement the Act clearly makes applicable to the Board, requires that the Board's order be set aside for this reason alone, and is also further evidence of the looseness of the Board's procedure at the time when this case was pending before it and of its impatience with procedural requirements, all of which to it appear technical, but conformity with which is the basis for the conclusiveness of its findings and is the "inexorable safeguard" which the due process clause assures. See *Morgan* v. *United States,* 298 U. S. 468, 481; Mr. Justice Brandeis concurring in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73.

g. *The Board's bias and prejudgment and its failure to reconsider the case.* The Board asserts categorically that the press releases of the Board and the public statements of one of its members and its General Counsel, all relating specifically to this particular case and made and issued prior to its purported "reconsideration" of the case, show nothing to support petitioner's charges that the Board entertained a fixed bias and prejudice against petitioner and accorded petitioner the forms of a hearing only for the purpose of making a record which, in the opinion of the Board, would sustain a second decision and order adverse to petitioner (Br. 28). But the Board fails to suggest any possible explanation for such press releases and statements other than such bias and prejudgment and a determination to keep petitioner "convicted" by the Board in the eyes of the public and petitioner's employees, despite its

withdrawal of the case for "reconsideration", and despite the setting aside of its first decision and order.

The bias and prejudgment thus publicly revealed cannot be disregarded on the specious ground, urged in the Board's brief, that in its final decision and order the Board modified, in certain respects, the findings which had been contained in its original and proposed decisions. It might as well be argued that in a damage suit the defendant was foreclosed from contending that the trial judge was disqualified by reason of his public statements revealing bias and prejudgment, because he granted the plaintiff smaller damages than were requested in the complaint, or because he gave judgment for the plaintiff on most, but not all, of his several separate causes of action. We should suppose that, even if the Board were utterly prejudiced and partisan, it would nevertheless have availed itself of the opportunity to revise its decision in the light of petitioner's exceptions and brief, in order that it might issue a final decision which would seem to the Board and its staff less likely to be reversed upon review.

No doubt the circumstances of the remand were such as to encourage the Board to adopt a partisan attitude in its reconsideration of the case, to identify its interests with those of the complaining union, and to attempt to justify its first decision and order by issuing a second decision and order against petitioner. It would be thought that under these circumstances the Board would have made every effort to maintain at least an outward public appearance of impartiality. Its utter failure to do so establishes that it entertained an overwhelming prejudice and did not intend—or was unable—to reconsider the case fairly and

impartially, as required by due process of law, and as contemplated by this Court in affirming the order of remand.

Dated January 30, 1941.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 661

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. VI, 611–628) is reported in 114 F. (2d) 905. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. V, 283–359) are reported in 14 N. L. R. B. 346.

JURISDICTION

The decree of the court below (R. VI, 629) was entered on October 8, 1940.[1] A petition for re-

[1] A supplemental decree (R. VI, 648) was entered on December 5, 1940, amending the prior decree in conformity

hearing filed by petitioner (R. VI, 630–647) was denied on December 2, 1940 (R. VI, 648). The petition for a writ of certiorari was filed on December 31, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether petitioner's discriminatory discharges were unfair labor practices.

2. Whether the Board's order should be denied enforcement because of its alleged failure to consider, in the absence of evidence, petitioner's asserted apprehensions concerning sit-down strikes.

3. Whether the Board made sufficient findings of fact to support its ultimate findings and conclusions that petitioner was responsible for assaults by its employees upon persons seeking to distribute union leaflets.

4. Whether petitioner was denied a fair hearing by reason of the conduct of the trial examiner who presided at the taking of the evidence.

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with the decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board*, No. 14, this Term, decided November 12, 1940, by striking from the Board's order the provision for reimbursement of governmental relief agencies; enforcement of this provision had been stayed by the prior decree pending decision in the *Republic Steel* case (R. VI, 629).

5. Whether the court below should have permitted petitioner to inquire into the Board's processes of decision.

6. Whether the Board's findings and order are invalid by reason of the fact that the record does not recite that they were made at a meeting of the Board.

7. Whether the Board prejudged the case and was biased against petitioner.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

On December 22, 1937, the Board issued its original decision and order against petitioner (R. III, 2094–2161) upon proceedings which included charges filed by the International Union, United Automobile Workers (a labor organization referred to herein as the U. A. W.), and by certain individuals (R. I, 5, 7, 8, 9, 10, 35, 37), a complaint alleging that petitioner had engaged in specified unfair labor practices at its River Rouge and Highland Park plants (R. I, 11–18), an answer by petitioner (R. I, 26–32), a hearing before a trial examiner (R. I, 33, *et seq.*), and transfer and continuation of the proceedings before the Board (R. III, 2093).

On January 23, 1939, the Board, with leave of the Circuit Court of Appeals, set aside its original findings and order for the purpose of reconsidering the entire case (R. V, 4–5). See *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364. On January 26, 1939, the Board issued proposed findings of fact, proposed conclusions of law, and a proposed order (R. V, 6–79) and provided that the parties should have the right to file exceptions and briefs and to request oral argument before the Board (R. V, 6). On February 6, 1939, the Board denied a motion by petitioner to suppress the evidence taken before the trial examiner and to set aside the hearing (R. V, 79–82, 84), and on March 31, 1939, denied a further motion by petitioner to adduce additional evidence (R. V, 140–269). Petitioner duly filed with the Board exceptions to the proposed findings of fact, conclusions of law, and order, together with a motion to dismiss the complaint on the grounds stated in the exceptions (R. V, 86–139, 140); petitioner likewise filed a brief in support of its exceptions. On April 22, 1939, counsel for petitioner and for the U. A. W. participated in extended oral argument before the Board (R. V, 275–280). On May 18, 1939, the Board denied a motion by petitioner for leave to supplement the record as to the procedure of the Board and to except and argue to the record as so supplemented (R. V, 281–283). On August 9, 1939, the Board, having reconsidered the

entire case, denied petitioner's motion to dismiss the complaint and, upon the entire record in the case, stated its findings of fact and conclusions of law, and issued its final order against petitioner (R. V, 283–359).

The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

In the spring of 1937, when the U. A. W. commenced a drive to organize petitioner's employees, Henry Ford issued a series of statements to the press evincing open hostility to that union and to labor organizations in general (R. V, 291-293). Newspaper reports of interviews with Ford quoted him as saying, among other things, that "Labor union organizations are the worst thing that ever struck the earth * * *" and that petitioner would "never recognize the United Automobile Workers' Union or any other union" (R. V, 291). These and other similar statements by Ford were not denied and served as a significant background to the campaign of intimidation and coercion which petitioner launched against the U. A. W. (R. V, 293).

On May 26, 1937, a group of from 50 to 70 persons, at least two-thirds of whom were women, at-

[2] Jurisdictional facts are omitted since no question as to jurisdiction is raised. References to the evidence supporting the Board's findings also are omitted, there being no contention that any of the findings are not supported by substantial evidence.

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tempted to distribute U. A. W. leaflets near outer entrances to the River Rouge plant and at various other places in the vicinity (R. V, 293–309). The distribution, though lawful, was forcibly prevented by two supervisory employees and various other employees of petitioner, including a number of Ford Service Men, as the company guards were called (R. V, 295–309). Without provocation (R. V, 319) those persons brutally assaulted many of the union group and seized their leaflets; some indication of the nature of the assaults is afforded by the fact that the back of one union man was broken, and another suffered a fractured skull (R. V, 301, 305). The first persons attacked were Richard T. Frankensteen and Walter P. Reuther, who were the U. A. W. officers in charge of the organizational drive (R. V, 294–296). While in the act of quietly leaving the overpass at Gate 4 of the plant in obedience to a command to "get the hell off of" Ford property,[3] they were surrounded, knocked down, kicked and slugged, their assailants being led by a member of the Ford Service Department and by two of petitioner's foremen (R. V, 295–299, 314).[4] One of these foremen later dragged one of

[3] The Board deemed it doubtful, and found it unnecessary to decide, whether any trespass upon petitioner's property had been committed by any of the union group (R. V, 316–317). The Board stated that "Technical trespass has never been recognized in law as a justification for extreme brutality" (R. V, 316).

[4] The assaults upon Frankensteen and Reuther and upon several others are vividly portrayed in the photographs of

the U. A. W. men to the office of the Service Department at Gate 4 and there participated in beating him up in the presence of Everett Moore, head of the Service Department (R. V, 301). There were numerous savage assaults on others of the union group, accompanied by imprecations which left no doubt that the offense was union affiliation (R. V, 295–309).

The Board found that petitioner was responsible for the assaults (R. V, 309–315). They were not a spontaneous outbreak on the part of "loyal employees" (R. V, 318–319). For some time prior to May 26 petitioner had been aware that the U. A. W. intended to distribute leaflets and had maintained a large number of guards at the plant gates (R. V, 309). One of these testified that his instructions were that, if he caught anyone passing handbills, "beat him up and bring him to the service office" (*ibid.*). On May 26, before the U. A. W. men appeared, petitioner stationed a large force of men at Gate 4 (R. V, 313). It expected friction to develop and, through Moore, head of the Service Department, announced to newspapermen

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newspapermen who were present at the scene (Bd. Exhs. 31–67). These and other newspapermen were interfered with and some had their films and notes forcibly taken by petitioner's employees (R. I., 244, 246, 254, 259, 265–266, 296–297, 299, 460, 534–535). One newspaper photographer was pursued for several miles by three Ford Service Men until he reached a police station (R. V, 306–307).

that although it would take no action to prevent the distribution of leaflets, "maybe some loyal employees might resent" the distribution and, if they tried to prevent it, "it wouldn't be the fault of the Ford Motor Company" (*ibid.*). Some of the employees who participated in the assault were led by petitioner's supervisors and practically all of the leading participants were paid by petitioner for their time spent in administering the beatings (R. V, 315, 319). Moore was present at the scene of the violence and acquiesced in the assaults (R. V, 301, 315).

On May 27, 1937, petitioner was responsible for further assault against two members of the U. A. W. who were driving along the public highway wearing their union pins (R. V, 323). In April and May petitioner distributed antiunion literature to its employees in such manner and under such circumstances as to coerce them (R. V, 319–323). Subsequently, a "Vote of Confidence" in the policies of Henry Ford was circulated through the River Rouge plant (R. V, 324). In many cases employees were asked by their foreman to sign the Vote; those refusing to do so had their badge numbers noted down (*ibid.*). Petitioner then publicized the Vote as an endorsement of its labor policies and as a rejection of the U. A. W. (*ibid.*). On various dates between February 2, 1937, and June 29, 1937, petitioner discriminatorily discharged 22 employees and caused the resignations

of 2 other employees because of their membership or activity in, or sympathy for, the U. A. W. (R. V, 324–345).[5]

Upon the foregoing subsidiary findings, together with ultimate findings that by its acts and those for which it was responsible petitioner had interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 and had discouraged membership in the U. A. W. (R. V, 319, 323–324, 344–345), the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. V, 357). The Board ordered petitioner to cease and desist from its unfair practices; to reinstate with back pay the employees illegally discriminated against; and to post appropriate notices (R. V, 357–359). The allegations of the complaint which were found to be unsupported (note 5, below) were dismissed (R. V, 359).

On September 13, 1939, the Board filed in the court below a petition for enforcement of its order together with a certified transcript of the record of the proceedings had before the Board pursuant

[5] The Board found that petitioner had not violated the Act with respect to 11 other employees alleged to have been discriminated against illegally (R. V, 345–355, 357). The Board likewise found that the evidence was insufficient to support the allegation that petitioner had dominated and interfered with the Ford Brotherhood of America, Inc., in violation of Section 8 (2) of the Act (R. V, 324).

to the remand (R. VI, 365–372). Upon stipulation of the parties, the record of the proceedings before the Board filed in the court below prior to the remand was ordered to be deemed filed as part of the record in the instant case (R. VI, 372–373). Petitioner filed an answer to the Board's petition for enforcement and a cross-petition for review of the Board's order (R. VI, 373–401). In addition, petitioner filed a motion to compel the Board to reply to certain allegations, contained in the answer and cross-petition, with respect to the Board's processes of decision (R. VI, 401–402); a motion directing the Board to supplement the record with respect thereto (R. VI, 421–424); a petition for leave to adduce additional evidence before the Board (R. VI, 428–559); a petition for a commission to take depositions (R. VI, 601–609); and a motion to compel the Board to certify alleged additional parts of the record (R. VI, 561–601). The petition for a commission to take depositions was denied on February 15, 1940 (R. VI, 610–611).

On October 8, 1940, the court handed down its opinion (R. VI, 611–628) and entered a decree (R. VI, 619) denying the other petitions and motions of petitioner and enforcing the Board's order except for the provision requiring petitioner to cease and desist from interfering, restraining, and coercing its employees through the distribution of antiunion literature, the provision requir-

ing the reinstatement and reimbursement of Emil Tomkow, and the provision for reimbursement of Governmental relief agencies. These provisions were set aside, the last one by a supplemental decree (R. VI, 648) entered December 5, 1940, in conformity with the decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board,* No. 14, this Term, decided November 12, 1940. A petition for rehearing (R. VI, 630–647) was denied on December 2, 1940 (R. VI, 648).

ARGUMENT

I

THE BOARD PROPERLY FOUND THAT PETITIONER VIOLATED THE ACT

1. *The Discharges.*—Petitioner contends that the discriminatory discharges found by the Board did not constitute unfair labor practices because "an employer may discharge persons belonging to an organization which he has reason to fear will attempt to seize his plant by force and violence" (Pet. 4–6, 19–21). This question is not involved in the present case; it can be raised only upon the assumption, unwarranted by anything in the record, that at the time of all of the discharges petitioner either had reason to fear or did fear that the U. A. W. would attempt to seize its plant. There is no evidence to that effect. See *infra,* pp. 14–15. Nor is there any evidence, or any claim, that a

single one of the discharges was intended as a precautionary measure against the asserted threat of a sit-down strike. Indeed, the evidence introduced by petitioner was designed to prove a precisely contrary point, that the employees' union affiliation had nothing to do with their discharge.[6]

Petitioner does not assert that the evidence does not afford the requisite support for the Board's findings (R. V, 324 *et seq.*) that petitioner discharged the employees because of their membership in, or lawful activity on behalf of, or sympathy for, the U. A. W. It follows, quite evidently, that whatever grounds for discharge petitioner subsequently decides might have been applicable, the discharges were illegal and in violation of Section 8 (3) and (1) of the Act. Cf. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 330–333; *National Labor Relations Board* v. *Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941.

The decision below is not in conflict, as petitioner asserts (Pet. 21), with the decisions in *National La-*

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[6] Petitioner's testimony ascribed the discharges to inefficiency or other causes applicable equally to union and non-union employees. In several instances the foremen called by petitioner to explain the discharges testified, in response to questions asked by counsel for petitioner, that they did not know that the men they discharged were members of or were sympathetic to the U. A. W. (R. III, 1625, 1647–1648, 1796, 1812, 1848, 1861, 1879). Petitioner introduced no evidence whatever as to the discharges of Kuzulis, Sheldon, and Smick.

bor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5), certiorari denied, 305 U. S. 653. In those cases sit-down strikes had occurred and the employers contested the Board's findings as to the reasons for the discharges, successfully claiming that the evidence established that the unlawful activities of the employees in the *Fansteel* case and the apprehension of further such activities in the *Peninsular & Occidental* case were the motivating factors. There can be no analogous claim in the present case.

2. *The Supposed Failure of the Board to Consider Sit-Down Strikes.*—Petitioner contends (Pet. 6-7, 21-23) that the Circuit Court of Appeals should have set the Board's order aside because the Board failed to consider facts and circumstances material to the issues presented, namely, sit-down strikes in the automobile industry and the supposed threat by the U. A. W. to seize petitioner's plant.

(a) The alleged threat to seize petitioner's plant, which seems to be the chief circumstance which the Board is claimed to have disregarded, is based simply upon surmise; no such evidence was introduced or offered by petitioner at the hearing. The claim (Pet. 6) that petitioner offered such evidence but that the trial examiner excluded it, is not supported by the references given (R. I,

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134–136, 600–601; V, 286) or by any other portion of the record.[7]

Indeed, the record affirmatively indicates that after the decisions of this Court on April 12, 1937, upholding the Act—subsequent to which all of the unfair labor practices occurred except three of the discharges—there was neither any threat of a sit-down strike nor any *bona fide* apprehension by petitioner that such a strike might occur. On the day following the decisions of this Court the national president of the U. A. W. publicly announced that a "strike to force Henry Ford to recognize the Union will not be necessary now" (Bd. Exhs. 112, 114, 115). On the same date Henry Ford stated, in effect, that he did not believe that there was likely to be "trouble of any kind" (Bd. Exhs. 112, 114, 115. See also R. III,

[7] Indeed, petitioner's counsel objected to the introduction of proof as to the dates of the General Motors and Chrysler strikes, and as to whether the U. A. W. was known to have called the strikes, on the ground that "it is all incompetent, irrelevant, and immaterial" (R. II, 1293; III, 1700–1701). The "offers of proof" relied upon by petitioner (Pet. 6) were contained in a motion to reopen the record made subsequent to the hearing and after the Board's original decision and order (R. V, 140). Since there were no reasonable grounds for petitioner's failure to have introduced or offered such proof at the hearing, and since the proof offered was immaterial, the Board properly denied the motion (R. V, 269). The court below likewise properly denied petitioner's similar petition for leave to adduce additional evidence (R. VI, 428).

1679–1680).[8] In the absence of any evidence inconsistent with these statements, it is doubtful whether judicial notice could be taken of anything beyond what the court below termed the "industrial phenomenon" of sit-down strikes (R. VI, 618), a phenomenon without particular relevance to petitioner's plant.[9] *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 301; *Osborne* v. *Gray*, 241 U. S. 16, 21.

(*b*) Even if it were assumed that the circumstances which petitioner claims the Board failed

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[8] The exhibits cited are accounts in three newspapers of an interview between Henry Ford and representatives of the Associated Press. The reports state, *inter alia:*

"Asked what the Ford Company would do in the event of a strike at the Rouge plant, Mr. Ford said:

"'We don't anticipate trouble of any kind, and we are not prepared to say what we would do.'"

[9] While there is evidence indicating that petitioner took certain precautions during the General Motors and Chrysler strikes, such evidence plainly would not have warranted a finding that petitioner's plants were either threatened or believed to be threatened at the subsequent time when the principal unfair labor practices were committed by petitioner (See R. I, 617, 671, 696, 713, 728; II, 938). The General Motors and Chrysler strikes occurred from December 30, 1936, to February 11, 1937, and from March 8, 1937, to April 6, 1937, respectively (R. II, 1293). Contrary to its action in its original and proposed decisions (R. III, 2156–2157, 2159; V, 73–74, 77), the Board in its final decision did not find that petitioner's "precautionary measures" constituted unfair labor practices. This may well indicate that the Board did consider the matters which petitioner complains it disregarded.

to consider had been available for consideration, the asserted failure would not warrant setting aside the order. The supposed threat of a sit-down strike and the other circumstances relied upon had no material bearing upon any of the issues which the Board decided against petitioner. As the Circuit Court of Appeals appears to have held (R. VI, 618–621), those circumstances could not justify, or absolve petitioner from responsibility for the assaults, the circulation of the "Vote of Confidence," or the discriminatory discharges. *Supra,* pp. 5–9. Petitioner does not assert the contrary and does not attempt to specify a single finding which should be changed if the case were remanded to the Board for further consideration in the light of its supposed fear of sit-down strikes. A remand, therefore, would be idle. Cf. *Baltimore & O. R. Co.* v. *United States,* 298 U. S. 349, 359; *Hathaway* v. *Cambridge National Bank,* 134 U. S. 494, 499; *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 473; *National Labor Relations Board* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 659 (C. C. A. 9).

3. *The Findings as to Petitioner's Responsibility for the Assaults of May 26.*—Petitioner contends (Pet. 8–9, 22–23) that the court below erred in sustaining the Board's findings and conclusions that petitioner was responsible for the assaults of May 26, 1937, and that it thereby interfered with, restrained, and coerced its employees in violation

of the Act (R. V, 309, 315, 319). The grounds of this contention are that the Board "did not reveal the theory on which it reached such conclusions, and it made no findings of ultimate fact from which such conclusions would follow under the theory of *respondeat superior*" or any other theory (Pet. 9). Even were this point well taken, which it is not, it would afford no occasion for granting the writ since the evidence and findings as to the assaults on the following day and as to the other unfair labor practices (*supra,* pp. 8–9) are ample to support the order.

The Board's extensive and detailed findings concerning the circumstances surrounding the assaults on May 26 are clearly sufficient to support the conclusion that those assaults constituted interference and coercion "for which the employer may fairly be said to be responsible." *International Association of Machinists* v. *National Labor Relations Board,* No. 16, this Term, decided November 12, 1940; *H. J. Heinz Co.* v. *National Labor Relations Board,* No. 73, this Term, decided January 6, 1941; *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, decided January 6, 1941. While it would in any event be immaterial that the Board did not state the theory upon which it reached its ultimate findings and conclusions (*Helvering* v. *Gowan,* 302 U. S. 238, 245–246; *Helvering* v. *Rankin,* 295 U. S. 123, 132–133), the organized and brutal assaults by petitioner's Service Men,

and together with the announcement of the head of the Service Department (*supra*, pp. 6–8) ~~foreman~~, makes petitioner's responsibility self-evident.

The implied claim that petitioner was not in fact responsible for the assaults is wholly inconsistent with the position taken by petitioner in its answer to the complaint and at the hearing. There petitioner did not claim or seek to prove absence of responsibility but, on the contrary, alleged that the assaults constituted lawful resistance by it to trespass and were committed by it in self-defense (R. I, 27–28; see also R. I, 136, 140, 141–145, 171–172; II, 1390–1419, 1439–1440, 1502–1505; III, 1978–1985).

II

THERE WAS NO PROCEDURAL DEFECT OR IRREGULARITY

1. *The Conduct of the Trial Examiner.*—Petitioner contends (Pet. 9–11, 23–24) that it was denied a full and fair hearing by reason of alleged misconduct by the trial examiner and that the decision of the court below in failing to set aside the Board's order on such ground is in conflict with the decisions of the Circuit Court of Appeals for the Seventh and Eighth Circuits in *Inland Steel Co.* v. *National Labor Relations Board,* 109 F. (2d) 9, and *Montgomery Ward & Co.* v. *National Labor Relations Board,* 103 F. (2d) 147, respectively. Similar contentions were made in the petition for certiorari in *Stackpole Carbon Co.* v. *National Labor Relations Board,* certiorari denied, 308 U. S. 605.

Petitioner cites, without discussion, a number of record references which are said to establish the impropriety of the trial examiner's conduct (Pet. 9–10). But those references afford no basis for attacking the holding of the court below that, while the examiner's conduct was "injudicious" at times, "material prejudice to the interest of the complaining litigant must clearly appear" and that "the prejudice urged * * * appears to rest upon pure speculation" (R. VI, 615–616).[10]

The record as a whole shows that the examiner accorded petitioner full opportunity to introduce evidence, cross-examine witnesses called by the Board, and otherwise meet the complaint and evidence against it.[11] Only once throughout the entire

[10] Compare *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 175; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350–351; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Subin* v. *National Labor Relations Board*, 112 F. (2d) 326 (C. C. A. 3), certiorari denied, No. 280, this Term, October 14, 1940; *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, decided January 4, 1941 (C. C. A. 5); *Cupples Co. Manufacturers* v. *National Labor Relations Board*, 106 F. (2d) 100, 113 (C. C. A. 8); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576.

[11] See *e. g.*, R. I, 125–148, 171–173, 444, 606–609, 621–624; II, 1332–1340, 1532–1535; III, 1629–1630, 1642–1644, 1718–1719, 1750, 1814–1816, 1877–1879, 1895–1900, 1953–1954, 1967–1969, 1980, 2081, 2089–2091. The Board's attorney made few objections to petitioner's introduction of evidence; when these objections appeared to the examiner to be unsound, they were overruled by him (R. I, 681; II, 1393, 1417; III, 1628).

hearing did petitioner find occasion to make an offer of proof; that offer related to the location of property lines, was immaterial to the issues, and was not renewed in petitioner's subsequent motion to reopen the record and petitions to adduce additional evidence (R. II, 1469–1470). Although represented by experienced counsel, petitioner at no time during the hearing, by objection, motion, or otherwise, made the claim urged here and in the court below, that the examiner's conduct "was plainly such as to induce Board witnesses to exaggerate and embroider their testimony, to intimidate witnesses called by petitioner * * *, and to hinder and discourage petitioner's counsel in the presentation of petitioner's case" (Pet. 10). Not until after the issuance of the Board's original decision and order and the appearance of appellate counsel who had not been present at the hearing (see R. I, 42), was this claim advanced, seemingly as an afterthought, and not until then did petitioner move to suppress the evidence or seek a rehearing (R. V, 79). Accordingly, it will not now be heard to urge that the hearing was unfair. *Drumm-Flato Commission* v. *Edmisson,* 208 U. S. 534, 540; *United States* v. *Atkinson,* 297 U. S. 157; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239. *Cf.* Rules and Regulations of the National Labor Relations Board, Series 1, as amended, Art. II, Sec. 28, quoted in the Appendix, p. 30.

The decision of the court below is not in conflict with the *Inland Steel* or *Montgomery Ward* decisions, as petitioner claims (Pet. 23). Each case "necessarily turns on its own facts." *United States* v. *Socony-Vacuum Oil Co., supra,* at 240. In the *Inland Steel* and *Montgomery Ward* cases, the conduct of the examiners which was held to have rendered the hearings unfair included, *inter alia,* over timely objections, the causing of improper omissions from the record (109 F. (2d) 13–14; 103 F. (2d) 149–150), excessively long examination of witnesses (109 F. (2d) 15, 18; 103 F. (2d) 155, 156), and unfair restriction of the employers' attorneys in their examination of witnesses (109 F. (2d) 18; 103 F. (2d) 151–156). No such circumstances are present in the instant case. Cf. *Cupples Co. Manufacturers* v. *National Labor Relations Board,* 106 F. (2d) 100, 113 (C. C. A. 8). Petitioner's further assertion (Pet. 23) that the decision of the court below is in probable conflict with certain decisions of this Court [12] is plainly unsound, especially since the examiner in the present case made no intermediate report or recommendation to the Board and did not participate in its decision (R. VI, 609, 610).

[12] *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304–305; *Tumey* v. *Ohio,* 273 U. S. 510, 522; and *Jordan* v. *Massachusetts,* 225 U. S. 167, 176. These cases involved, respectively, a commission's use of matters outside the record, a judge's pecuniary interest, and a juror's mental competency.

2. *The Board's Processes of Decision.*—Petitioner contends (Pet. 11–14, 25–27) that the Circuit Court of Appeals erred in denying various motions and a petition made by petitioner,[13] that these denials "prevented petitioner from obtaining a trial upon the justiciable issue presented by allegations already declared by this Court to afford, if true, a sufficient ground for setting aside the Board's order" (Pet. 14), and that the rulings are in probable conflict with the decisions in *Morgan* v. *United States,* 298 U. S. 468, 304 U. S. 1, and *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364.

As appears from their face, the motions and petition were filed in the hope of unearthing something in the Board's processes of decision to support petitioner's allegations that it had been denied a full and fair hearing in that, *inter alia,* the members of the Board, in considering the evidence and deciding the issues, had relied too extensively upon subordinates, had given weight to matters not in evidence, and were biased against employers in

[13] The motions were for the issuance of orders (1) compelling the Board to reply to allegations made by petitioner in its answer to the petition for enforcement and its cross-petition for review (R. VI, 401–402); (2) directing the Board to supplement the record (R. VI, 422–424); and (3) directing the Board to file alleged additional parts of the record (R. VI, 562–566). The petition was for a commission to take the depositions of two of the members of the Board and of 13 present or former employees of the Board (R. VI, 604–608).

general and against petitioner in particular (R. VI, 378–387).

The motions and petition were not filed pursuant to any provision of the Act. Moreover, they were not supported by any showing, much less a *prima facie* one, that the allegations, which were made upon information and belief, had any basis in fact.[14] In the absence of such a showing and in view of the presumption of official regularity and of the full proceedings shown by the record, including the oral argument before the members of the Board (R. V, 275, 287), it would have been "wholly improper" for the court below to have granted the motions or petition. *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, 593; *De Cambra* v. *Rogers,* 189 U. S. 119, 122; *Clark* v. *United States,* 289 U. S. 1, 14, 18; *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, 145; *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 477–478.[15]

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[14] Petitioner contends (Pet. 13–14, 26) that its allegations were supported by the affidavit of one of its attorneys (R. VI, 567–601). Insofar as the quotations and other matters set forth in the affidavit may be said to be relevant at all, they indicate merely that, in general practice, the members of the Board in analyzing the evidence and embodying their decisions in written form are assisted by subordinates, comparable to judges' law clerks, who do not partcipate in the Board's prosecuting functions. Such assistance is both necessary and proper. *Morgan* v. *United States,* 298 U. S. 468, 481, and cases cited, *infra,* pp. 24–25.

[15] In the *Federal Communications Commission* case the Court sustained a ruling of the Court of Appeals for the Dis-

The action of the Circuit Court of Appeals in denying the motions and petition is in accord with its action prior to the remand in sustaining the Board's objections to interrogatories and in denying a petition for a commission to take depositions. 99 F (2d) 1003. It accords also with that court's denial of a motion to require answers to interrogatories propounded by the employer in *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, certiorari denied, 308 U. S. 568,[16] and with the decisions of five other Circuit Courts of Appeals and of the Court of Appeals for the District of Columbia denying various other attempts to support allegations similar to those herein.[17]

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trict of Columbia (106 F. (2d) 321, 326–327) denying a motion for a diminution of the record filed in an attempt to prove that the Commission allegedly had used as evidence certain data and reports which had not been introduced at the hearing and which the respondent had not had an opportunity to examine. The Commission's denial that it had considered the data or reports as evidence may be compared with the statements contained in the Board's signed decision herein that it had considered petitioner's exceptions and brief and that it made its rulings and order "*upon the entire record in the case*" (R. V, 288).

[16] The petition for certiorari in the *Louisville Refining* case urged, as one of its two main contentions, that the court had erred in denying the motion for answers to interrogatories.

[17] *National Labor Relations Board* v. *Botany Worsted Mills*, 106 F. (2d) 263 (C. C. A. 3); *National Labor Relations Board* v. *Lane Cotton Mills Co.*, 108 F. (2d) 568 (C. C. A. 5); *Inland Steel Co.* v. *National Labor Relations Board*, 105 F. (2d) 246 (C. C. A. 7); *Cupples Co. Manufacturers* v.

The Circuit Court of Appeals' denials of petitioner's motions and petition are not in conflict with the *Morgan* or *Ford* decisions, *supra*. The *Morgan* case, in sharp contrast to the situation herein, involved allegations of insufficient hearing which were supported by a showing on the face of the record that there had been no complaint or other document advising the company of the Government's claim against it; no proposed findings, conclusions, or order to which exceptions could be filed or argued; and no oral argument before the official who issued the order (298 U. S. at 474–477; 304 U. S. at 17–19). The Court, in its second decision declared that "it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required" and assumed that the Secretary understood the evidence (304 U. S. at 18). It held the order invalid because "Those who are brought into contest with the Government in a quasi judicial proceeding * * * are entitled to be fairly advised of what the Government proposes

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National Labor Relations Board, 103 F. (2d) 953 (C. C. A. 8); *Donnelly Garment Co.* v. *National Labor Relations Board*, motion decided November 7, 1940 (C. C. A. 8); *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 16 (C. C. A. 9); *Bethlehem Steel Co.* v. *National Labor Relations Board*, motion decided October 7, 1940 (App. D. C.); *Southern Garment Manufacturers Association, Inc.* v. *Philip B. Fleming*, petition to take testimony and Supplement record denied November 29, 1940 (App. D. C.)

and to be heard upon its proposals before it issues its final command" (304 U. S. at 18–19).

The *Ford* case presented no issue concerning the propriety of an inquiry behind the record into the Board's processes of decision, and the Court did not suggest that such an inquiry would be proper. In commenting that the alleged failure of the Board to consider the evidence and reach its own decision constituted a ground "sufficient for setting aside the order," the Court assumed the truth of the allegations merely for purposes of illustrating the propriety of the Circuit Court of Appeals' action in granting the Board's motion to remand (305 U. S. 364, 372).

3. *The Absence of a Recital of a "Meeting."*— Petitioner urges (Pet. 14–16, 27–28) that in failing to set aside the Board's order on the ground that the record does not recite that the decision and order were considered and made at a meeting of the Board, the Circuit Court of Appeals decided "an important question of Federal law" which warrants review by this Court.

The entire argument is based on an assumption, from the fact that the contrary is not recited, that the Board's decision and order were not made at a meeting of the Board.[18] But the mere absence of

[18] The assumption is not spelled out, but upon the basis of the absence of a formal recitation, petitioner states that "it appeared from the record that * * * the purported findings and order of the Board * * * were never considered and adopted by the Board as a board" (Pet. 14).

a formal recitation such as prefaced some of the Board's interlocutory orders in this case (Pet. 15n) does not warrant this assumption. Contrary to petitioner's assertions (Pet. 15, 28), other orders, issued at various stages of the proceeding, did not recite that they had been made at Board meetings (R. V, 7–79, 85, 275, 276–277, 279–280; see also, R. I, 32–33; III, 2094–2161, 2172). Although these included the Board's proposed findings, conclusions, and order (R. V, 7–79), petitioner did not except or object to them on the ground that they were not "considered and adopted by the Board as a board" (Pet. 14). No feature of the record other than the lack of a formal recitation is claimed to, or does, indicate that the Board's final decision and order were not made at a meeting of the Board.

However, if petitioner's assumption were indulged that the Board had held no meeting, the short answer to the contention is that there is no provision of the Act and no rule of law requiring that the Board's orders and decisions be made at meetings.[19] The Act provides merely that if, upon the record, "the Board shall be of the opinion" that unfair labor practices have been committed,

[19] The decisions of state courts cited by petitioner (Pet. 27) did not involve the Act or administrative or quasi-judicial agencies comparable to the Board. Instead, they involved ordinances or statutes relating to municipal, town, or county board, such as school boards, of an executive or legislative, as distinct from a quasi-judicial, character.

"then the Board shall state its findings of fact and shall issue * * * an order * * * ." Section 10 (c). To read into this language a requirement that the Board adopt its orders only after it had formally declared itself to be in a "meeting" would be to impose, without any occasion, a formal procedure which Congress did not intend and which is not prescribed for courts or for quasi-judicial agencies comparable to the Board. Cf. *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 369.[20]

4. *The Claim of Bias and Prejudgment.*—Petitioner contends (Pet. 28–29) that the Circuit Court of Appeals should have set aside the Board's order for the reason that the Board was biased against petitioner, prejudged the issues, and failed to reconsider the case as required by the remand. Unsupported claims of this character scarcely would be tolerated if made against a court. Cf. *Ex parte American Steel Barrel Co.,* 230 U. S. 35, 43–44; *The Press Co.* v. *National Labor Relations Board,* decided December 9, 1940 (App. D. C.); *Henry* v. *Speer,* 201 Fed. 869 (C. C. A. 5th). The press releases and public statements cited by petitioner show nothing to support its drastic charges (R. VI, 570, 587, 592). That the

[20] While the orders of some federal agencies are recited to have been made at meetings, this is not true of the orders of courts or of other agencies, including the Board of Tax Appeals, the Federal Power Commission, and the National Mediation Board.

Board carefully and impartially reconsidered the case following the remand is affirmatively evidenced by the substantial differences between its final and its original findings and order. In contrast with its original findings, the Board found in its final decision, *inter alia,* that the evidence did not support the allegations that petitioner dominated and interfered with the Ford Brotherhood of America, Inc., in violation of Section 8 (2) of the Act (R. V, 324), and discharged Sable, Dovey, Schipper, Barron, and Winsiewski in violation of Section 8 (3) of the Act (R. V, 345; compare R. III, 2129–2133, 2143–2144, 2145–2146, 2148).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

A. Article II, Sec. 28 of the Rules and Regulations of the National Labor Relations Board, Series 1, as amended, is as follows:

> Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, shall be stated orally, together with a short statement of the grounds of such objection, and included in the stenographic report of the hearing. No such objection shall be deemed waived by further participation in the proceeding.

B. The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or

condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

SEC. 10. * * *

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the

order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * *

(e) * * * Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

(f) * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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